Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC.,

Petitioner,

v.

CITY OF MAYFIELD HEIGHTS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Ohio Court of Appeals, Eight Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment tolerate imposition of a tax, substantially all of which is borne by a single First Amendment speaker?

2. May state courts disregard the teaching of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)—that a tax borne exclusively or predominantly by a small group of protected speakers is inherently suspect—and apply relaxed scrutiny merely because there is not present evidence of overt content discrimination?

3. May state courts impose a more stringent burden on First Amendment speakers than the standard promulgated by this Court by requiring proof of unconstitutionality beyond a reasonable doubt?[1]

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[1] The Ohio court of appeals declined to address, as mooted by the decision at issue in this Petition, the question whether due process demands that petitioner obtain refunds of the taxes paid. *See McKesson Corporation v. Div. Of Alcoholic Beverage and Tobacco*, 496 U.S. 18 (1990).

PARTIES TO PROCEEDING

The parties to the proceedings below were the petitioner Regal Cinemas, Inc.,[2] and the following respondents:

1. City of Mayfield Heights, Ohio, and Margaret Egensperger and Robert G. Tribby, sued solely in their official capacities as Mayor and Finance Director, respectively, of the City of Mayfield Heights;

2. City of Solon, Ohio, and Kevin C. Patton and Dennis Anderson, sued solely in their official capacities as Mayor and Finance Director, respectively, of the City of Solon;

3. City of Middleburg Heights, Ohio, and Respondents Gary W. Starr and Tim Pope, sued solely in their official capacities as Mayor and Finance Director, respectively, of the City of Middleburg Heights;

4. City of Westlake, Ohio, and Respondents Dennis Clough and William Fritzsche, sued solely in their official capacities as Mayor and Financial Director, respectively, of the City of Westlake.

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[2] Pursuant to Supreme Court Rule 29.6, Petitioner Regal Cinemas, Inc. provides the following corporate information. Regal Cinemas, Inc. has no corporate parent (*i.e.*, no single entity owns more than 50% of its equity securities) and no publicly held company owns 10% or more of its equity securities.

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OPINIONS BELOW

The unreported opinions of the trial court, the Court of Common Pleas for Cuyahoga County, Ohio, and the appellate court, the Eighth District Court of Appeals for Cuyahoga County, Ohio, are set forth in the Appendix at App. 20a and App. 2a, respectively.

BASIS FOR JURISDICTION

This matter involves the constitutionality under the First Amendment of the admissions tax ordinances of four Ohio cities as applied to the petitioner. The petitioner timely raised the constitutional issue in its complaint for declaratory and injunctive relief against the respondents. (App. 76a) This Petition seeks review of the decision entered by the Eighth District Court of Appeals for the County of Cuyahoga, Ohio, on March 20, 2000, affirming the decision of the trial court, which upheld the constitutionality of the taxes.

The petitioner timely filed an appeal to the Ohio Supreme Court. By Order dated July 19, 2000, the Supreme Court of Ohio denied review. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

The petition is timely filed as provided in 28 U.S.C. § 1257(a), and Rule 13.1 of the Rules of this Court.

The decision of the Court below is inconsistent with decisions on this same issue by appellate courts in California, Washington, and Colorado. Review by this Court is necessary to ensure that its decisions on the important Constitutional issue of the proper interpretation of the protections afforded by the First Amendment are uniformly and consistently applied throughout the Country.

CONSTITUTIONAL PROVISIONS

AND ORDINANCES INVOLVED

The following constitutional and legislative provisions are set forth in their entirety in the Appendix, as indicated:

Constitutional Provisions

United States Constitution, Article VI (App. 30a)
United States Constitution, First Amendment (App. 30a)
United States Constitution, Fourteenth Amendment (App. 30a)

Municipal Ordinances

Mayfield Heights Municipal Code, Chapter 791, §§ 791.01-791.99 (App. 33a);
Solon Municipal Code, Chapter 894, §§ 894.01-894.99 (App. 43a);
Middleburg Heights Municipal Code, Chapter 701, §§ 701.01-701.99 (App. 52a);
Westlake Municipal Code, Chapter 191, §§ 191.01-191.99 (App. 61a).

STATEMENT OF THE CASE

This case involves the constitutionality of four virtually identical municipal taxing ordinances imposed almost exclusively on petitioner's First Amendment activities. Deeming such narrowly targeted taxation inherently suspect, this Court has consistently invalidated it. *See, e.g., Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Leathers v. Medlock*, 499 U.S. 439 (1991). The Ohio Court of Appeals fundamentally misstated the applicable rule in this sensitive area of First Amendment protections, holding that the

absence of overt content discrimination warrants relaxed scrutiny, and validates the taxes, even if they target a single First Amendment speaker.

The petitioner owns and operates motion picture theaters throughout the greater Cleveland market, including first run, multi-screen theaters in each of the respondent cities.

The respondents are four municipalities in the greater Cleveland area, each of which adopted by ordinances admissions taxes between 1947 and 1953. The admissions taxes are similar in structure and operation. Each imposes a tax—three percent or five percent—on amounts paid for admission to any "place" within each respective city. The term "place" includes, for example, theaters, dance halls, athletic pavilions and fields, stadiums, golf courses, concerts and outdoor amusement parks. Each ordinance exempts most events held by non-profit organizations.

Each ordinance requires the tax to be paid either by the patron or the vendor, but imposes ultimate responsibility for payment on the vendor. The person who collects an admissions charge is to collect the tax and remit it to the municipality. But if the vendor responsible for collecting and remitting the tax fails either to collect or remit the tax, that vendor "shall nevertheless be personally liable to the City for the amount of such tax." If a vendor does not pay the taxes to the respective Cities, it may be convicted of a misdemeanor, fined or its principals incarcerated.

The admission price paid by patrons of the four theaters involved in this litigation varies depending upon a number of competitive factors, including the prices charged by other theaters, and other types of entertainment. For competitive reasons, the petitioner is unable to add the admissions tax onto its otherwise stated admissions price. Accordingly, the petitioner pays the admissions taxes to each of the cities out of

its general operating revenues rather than charging its customers for the tax directly.

The petitioner has paid almost all of the admissions taxes collected by each City since opening its theaters. For the years 1996-1998, when the instant litigation commenced, the petitioner paid between 88 percent and 100 percent of the admissions taxes collected by Mayfield Heights, Westlake, Middleburg Heights, and Solon.

Each city deposits its admissions tax proceeds into its general revenue or operating account and uses the proceeds only as a general revenue source. None of the cities restricts the admission tax proceeds to offset the cost of any specific government service at the petitioner's location.

Prior to the trial of this case, none of the cities performed any "cost accounting" for municipal services in setting the rate of the admissions taxes or ensuring whether the amount of revenue raised from this tax had any relationship to municipal services rendered to the petitioner. In fact, with one exception,[3] none of the cities charges any of its residents or businesses for the cost of its services on a usage basis, as some cities do.[4]

The petitioner brought the instant action seeking

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[3] The City of Solon's police department charges a fee when it responds to false-alarm calls above a certain number in a given time period.

[4] It was established at trial that except for data created specifically for the instant case, none of the cities had any objective data that demonstrated any relationship between the services provided to the petitioner and the admissions tax receipts from the petitioner. None of the cities ever established an annual budget to account for additional costs the city bears for providing services to the petitioner or to any other entity subject to the admissions or any other tax.

declaratory and injunctive relief alleging that each city's admissions tax as applied to it violated its rights under the First and Fourteenth Amendments. The Complaint also demanded a refund of taxes previously paid by the petitioner. The trial court entered the temporary restraining order requested by the petitioner that same day enjoining further enforcement and collection of the taxes from the petitioner from one of the Respondents, the City of Mayfield Heights, whose current tax payment was immediately due. The petitioner also requested a preliminary injunction be entered against all respondents. Following a hearing on June 1, 1998, the trial court overruled and dismissed the petitioner's Application for Preliminary Injunction against the enforcement and collection of the admissions taxes by all respondents.

After all respondents had answered and all parties had conducted discovery, all parties filed cross-motions for summary judgment on September 1, 1998. The parties also filed a Stipulation of Facts that same day. The trial court denied each motion and held a two-day bench trial commencing October 20, 1998. At trial, the respondents introduced evidence relating to the cost of providing normal police services at the petitioner's theaters in their jurisdictions.

Each respondent admitted that their cost computations had been prepared in connection with the instant case; that such computations normally were not made, and that none of them sought to charge any business for the specific costs involved in providing such municipal services. Thereafter the trial court entered judgment in favor of respondents on January 5, 1999.

The petitioner filed a timely appeal to the Ohio Eighth Circuit Court of Appeals for Cuyahoga County, which affirmed the trial court's decision in a Journal Entry and Opinion dated March 9, 2000, and journalized on March 20, 2000. The petitioner timely appealed to the Ohio Supreme Court, which declined to take the case by Order dated July 19, 2000.

The Ohio Eighth Circuit Court of Appeals, in affirming the trial court's decision, held that in an Ohio court, the petitioner must prove "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."[5] Finding no evidence of actual "suppression of certain ideas," the Ohio Court of Appeals concluded that petitioner had not proven unconstitutionality beyond a reasonable doubt. Though petitioner's payment of most, or all, of the admissions taxes at issue **poses the chilling specter of content manipulation by its structure alone**, the Ohio court mistakenly applied relaxed scrutiny based upon a fundamental confusion of what constitutes "content-based" regulation.

The Ohio court rejected the strict scrutiny test because it concluded that the taxes were "content-neutral" since (a) there was nothing in the language of any of the admissions taxes which referred to the content of any film, and (b) there was no evidence introduced at trial that any of the cities had actually attempted to or threatened to censor any film which the petitioner exhibited, or planned to exhibit. Absent such evidence, the court concluded that the tax was not a "content-based" regulation. The taxes therefore did not run afoul of the targeting proscription in *Minneapolis Star*, and should be reviewed under the "intermediate scrutiny" test—as filtered through Ohio's "beyond a reasonable doubt" test.

The Ohio court of appeals rejected petitioner's argument that the tax was invalid even under this test. The court concluded that the taxes raised revenue, that the petitioner's operations generated additional costs to the cities, and that the taxes served the important governmental interest of

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[5] The Ohio court of appeals relied on the Ohio Supreme Court's decision in *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St. 3d 46, 47 (1990). *Doyle* involved an interpretation of the Ohio Constitution, not the Federal Constitution.

raising revenue that would help offset these additional costs.

None of the cities ever demonstrated any correlation, intended or accidental, between additional municipal costs and the revenue pursued from petitioner. No other business in any of the shopping centers where petitioner's theaters are located (or any other business in any of the cities) are required to pay any portion of these additional expenses. Yet because petitioner's business had grown, and there was no historical evidence of attempted censorship, the Ohio court dismissed the relevance of the First Amendment to the targeted tax. The Ohio Supreme Court declined jurisdiction by Order dated July 19, 2000. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because:

(1) A tax borne solely by a single First Amendment speaker is repugnant to the Constitution;

(2) The Ohio court fundamentally misstates the strict-scrutiny rule, which applies to both an overt content-based regulation, as well as a regulation which, in its application, poses the inherent **threat** of content manipulation;

(3) The Ohio court disregards the teaching of *Minneapolis Star,* as refined in subsequent decisions, and this Court should avert further distortion and chilling effect at this sensitive intersection of taxation and protected speech; and

(4) As is the practice in several states, the lower courts in Ohio accorded a rigorous presumption of constitutionality to the tax ordinances, and required proof "beyond a reasonable doubt" to overcome that presumption. In the case of fundamental rights, such as First Amendment freedoms, such a burden is irreconcilable with this Court's pronouncements of

the government's burden of justification.

Absent this Court's intervention, petitioner and others similarly situated are effectively walled off from the critical protections of the First Amendment. According to the courts of Ohio and other states, those engaged in protected activities must prove beyond a reasonable doubt that any government action with respect to a tax must have censorial motivation, even though the tax applies almost exclusively to one or a few First Amendment speakers. Finding no verifiable history of censorship, the Ohio court of appeals improperly disregards the inherent capacity of such a narrowly applied tax to achieve precisely the mischief of direct content regulation. A manipulation of the rate—or the veiled threat of same—or the announcement of a special "audit"—or the veiled threat of same—can operate as surely as direct content discrimination (albeit *without* equivalent political accountability) to distort petitioner's freedom of expression. Dissatisfaction with the content of motion pictures—and the specter of government moving against their makers and sellers—are hardly abstract possibilities. Thus could an *otherwise* neutral tax—if borne primarily by movie theaters—become a pernicious instrument of content manipulation. And thus does such a tax scheme warrant strict scrutiny, with the burden on *government* to prove its constitutionality.

Since this Court's decision in *Minneapolis Star* almost twenty years ago, the petitioner and others have been forced to challenge these cases, municipality by municipality. All of these challenges have involved the same issue: the validity of such taxes under the First Amendment. Ohio is the first state to validate admissions taxes which fall primarily on First Amendment protected activities.[6] A definitive ruling by this

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[6] *See Forbes v. City of Seattle*, 113 Wash.2d 929, 785 P.2d 431 (1990) (applying *Minneapolis Star* to uphold validity of

Court is necessary to correct this erroneous result, and to avoid perpetuating the expensive and time-consuming process of challenging these taxes city by city.

ARGUMENT

1. THE FIRST AMENDMENT PROHIBITS A CITY FROM IMPOSING A TAX PRINCIPALLY ON ONE TAXPAYER ENGAGED IN FIRST AMENDMENT ACTIVITIES.

The Ohio court validated a tax that applies almost exclusively to a single taxpayer engaged in First Amendment activities. That decision cannot stand. It reflects a dangerous

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admissions tax where First Amendment activities bore only twenty percent of tax burden); *United Artists Communications, Inc. v. City of Montclair*, 209 Cal. App. 3d 245, 257 Cal. Rptr. 124 (Ct. App.) (applying *Minneapolis Star's* strict scrutiny test to admissions tax, 90% of which was borne by two movie theaters and two adult book stores), *cert. denied*, 493 U.S. 918 (1989); *Festival Enterprises, Inc. v. City of Pleasant Hill*, 182 Cal. App. 3d 960, 227 Cal. Rptr. 601 (1986) (applying strict scrutiny test to hold admissions tax unconstitutional where revenues from the tax came solely from plaintiff movie theaters). *See also Cinamerica Theaters, L.P. v. City of Boulder*, Co. Ct. of Appeals No. 98CA0340 (July 8, 1999) (under *Minneapolis Star*, application of facially neutral admissions tax may be invalid as applied to appellant movie theaters if they bear a disproportionate burden of the tax). For the application of these principles in the case of other targeted municipal taxes, *compare City of Alameda v. Premier Communications Network, Inc.*, 156 Cal.App.3d 148, 202 Cal.Rptr. 684 (Ct. App.) (ordinance imposing a different business license fee on cable television services than on business generally held invalid under *Minneapolis Star*), *cert. denied*, 469 U.S. 1073 (1984), *with Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 410 S.E. 652 (1991) (utility tax on cable television service upheld; not clear how many taxpayers subject to the tax).

misunderstanding of (1) the government's burden of justification at the sensitive intersection of taxation and First Amendment activity; (2) the teaching of *Minneapolis Star* and its progeny that narrowly targeted taxation of First Amendment activity is *inherently* suspect; and (3) the principle that strict scrutiny applies to both direct content suppression *and* to regulatory schemes that pose the same threats, as applied, as content discrimination.

A. The First Amendment Protects Petitioner's Exhibition of Motion Pictures.

It is well-settled that petitioner's display of motion pictures enjoys the full protection of the First Amendment to the United States Constitution. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("expression by means of motion pictures is included within the free speech and free press guaranties of the First and Fourteenth Amendments."). *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (as with political and ideological speech, entertainment, such as motion pictures and live musical and dramatic works, is protected by the First Amendment).

B. Tax Burdens Borne by a Few First Amendment Speakers Are *Inherently* Suspect, and Thus Warrant Strict Scrutiny.

Generally applicable taxes are valid even though First Amendment activities are subject to such taxation. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994); *Leathers v. Medlock*, 499 U.S. 439 (1991); *United States v. O'Brien*, 391 U.S. 367, 376 (1968). However, a government-imposed burden, including taxation, which applies to a narrow base of First Amendment activities, is presumptively invalid. *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1981); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*

of Revenue, 460 U.S. 575, 585 (1983). Here, a tax which conceivably applied to several civic and recreational activities, when enacted, now applies only to one: a single taxpayer engaged in First Amendment protected activities.

The Ohio court concluded that because the tax was valid when passed (which is to say, it would have survived a facial challenge), its validity persisted, *unless* the only taxpayer now subject to the tax could prove "beyond a reasonable doubt" that the government in fact attempted censorship. Thus, according to the Ohio court, a tax which would be invalid if enacted as it applies today is valid merely because it was enacted before the protected First Amendment activity commenced. In reaching this strange result, the Ohio court ignored the solicitude of the First Amendment for speakers confronting not merely *actual* censorship, but the equally pernicious *threat* of censorship. The First Amendment creates a deliberately indulgent space for free expression.

A government regulation or tax, which, on its face *or as applied*, poses the threat of manipulation to affect the content of First Amendment expression, is subject to strict scrutiny. Absent a compelling governmental interest, such regulation is invalid, regardless of the government's motivation at the time the regulation was adopted.

In *Minneapolis Star*, this Court held that a tax levied solely on activities protected by the First Amendment, even though enacted solely for revenue and not for censorial purposes, is unconstitutional unless the taxing authority satisfies the stringent burden of showing that (1) the tax is justified by a compelling state interest and (2) the interest cannot be achieved through other means less intrusive on First Amendment rights. *Minneapolis Star,* 460 U.S. at 585; *see United States v. Lee*, 455 U.S. 252 (1982); *United States v. O'Brien*, 391 U.S. 367 (1968). Moreover, the Court held that a taxing authority could not justify at all a tax falling entirely

on a small group of taxpayers engaged in protected speech. 460 U.S. at 591-92.

Probing skeptically for actual censorial purpose, the Ohio court below concluded that *Minneapolis Star* did not apply:

> [t]here is nothing in the language of the relevant ordinances which refers to content of films shown. There is nothing in the history of the adoption of these ordinances, nor was there any evidence at trial that the Cities have attempted to or threatened to affect in any fashion the content of the films Regal shows. In short, there exists no evidence of legislative intent to suppress or restrict the Regal's right of free speech.

App. at 9a (emphasis added). This conclusion erroneously assumes that overt content suppression is an essential element of all tax challenges, and exploits the result—but ignores the reasoning—of this Court's decisions in *Leathers v. Medlock*, 499 U.S. 439 (1991), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

In *Leathers*, the state extended its generally applicable sales and use tax to cable television revenues. The tax already applied to a variety of goods and services, on its face and in actual practice. The state simply added cable television. Thus, there was no realistic danger that the state would hike a generally applicable sales and use tax merely to punish a disfavored cable-television message.

The Court found no threat of imposing, raising, or otherwise manipulating the general sales tax in an effort to control cable speech.[7] In *Minneapolis Star*, by contrast,

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[7] Several lower courts have reached similar conclusions with respect

manipulating the tax rate could affect content, because the tax in effect singled out First Amendment speakers for unique tax treatment. 460 U.S. at 581. It is enough, this Court declared in *Minneapolis Star* and reiterated in *Leathers*, that an otherwise generally applicable tax falls solely on a small number of First Amendment taxpayers to treat it as a content-based regulation:

> The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas.

Leathers, 499 U.S. at 448. Critical to this constitutional protection—and critically disregarded by the Ohio court—is the understanding that a speaker-focused tax need not *overtly* discriminate on the basis of content to offend the First Amendment. It is enough, simply, that "[t]he risk is similar." *Id.* Thus, when a tax scheme in practice burdens only one or a few speakers, it is unnecessary to search for the indicia of actual content discrimination or declared censorial motivation.

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to broad-based taxes which could not be manipulated to affect content. *See, e.g., Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr. 346, *review denied* Sept. 3, 1987; *Thomson Newspapers, Inc. v. City of Florence*, 287 S.C. 305, 338 S.E.2d 324 (1985); *In re Assessment of Additional North Carolina & Orange County Use Taxes Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E.2d 155 (1984), *appeal dismissed*, 472 U.S. 1001 (1985); *Chicago Tribune Co. v. Johnson*, 119 Ill. App. 3d 270, 456 N.E.2d 356 (1983), *aff'd*, 106 Ill. 2d 63, 477 N.E.2d 482, *appeal dismissed*, 106 S.Ct. 241 (1985) (1985); *Frye v. Commissioner of Finance*, 95 A.D. 2d 274, 466 N.Y.S. 2d 3 (1983), *aff'd*, 477 N.Y.S.2d 611 (1984); *North American Publications, Inc. v. Dept. of Revenue*, 436 So.2d 954 (Fla. App. 1983), *review denied*, 499 So. 2d 265 (Fla. 1984).

The "danger of censorship" inheres in the small and exposed tax base of First Amendment speakers. Thus, the most benign intent imaginable at *enactment* says nothing of constitutional moment to the *risk* that:

- government might easily manipulate, or merely threaten manipulation of, the tax rate to influence content;
- government might easily announce, or merely threaten, a burdensome audit to influence content; or
- theater owners might engage in self-censorship to avoid entanglement with the threats posed by the tax; or
- potential theater owners might decline to locate in the municipality, or investors might choose to restore an old building into something other than a motion picture theater, to avoid the burdens of a targeted tax.

These are precisely the immeasurable costs that First Amendment vigilance is designed to avoid. Abridgement of free expression does not typically occur in modern times as a naked act of suppression. While that is surely progress, it also demands greater vigilance, and stricter scrutiny, to guard against the subtler, hidden forms of government-distorted expression.

In *Turner,* likewise misapprehended by the Ohio court of appeals, the Court considered the "must-carry" provisions enacted to regulate competition in the video industry and to redress cable operators' anti-competitive practices. The Court concluded that there was no risk that these regulations could adversely affect content. Indeed, the Court found that the regulations were intended to broaden content, by ensuring that one form of communication, cable, did not destroy another form of communication, broadcast television. Accordingly, the Court concluded that an intermediate level of scrutiny was sufficient to protect the First Amendment protected interests involved—and in so doing, *expressly distinguished the kind of*

targeting at issue here:

> [T]he [must-carry] provisions do not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star* and *Arkansas Writers' Project*. 512 U.S. at 661.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481U.S.221 (1987), this Court invalidated an entire state sales tax system because one of its provisions unduly interfered with First Amendment protected freedoms. There, the Court concluded that a state sales tax scheme, in existence since 1935, violated the First Amendment because it inappropriately exempted some types of magazines from the tax but not others. Under the Arkansas taxing scheme, newspapers, and "religious, professional, trade and sports journals and/or publications printed and published" in Arkansas were exempted from the general state sales tax. The taxpayer published a general interest monthly magazine which included articles on religious and sports topics. The Arkansas courts held that the taxpayer did not qualify for a sales tax exemption, and found the tax constitutional.

In striking down this 50 year old state wide tax system on First Amendment grounds, the Court reaffirmed its teachings in *Minneapolis Star* discussed herein:

> Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment. ... In *Minneapolis Star*, the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. ... Second, the tax targeted a small group of newspapers. This

> was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Id.* at 591.
>
> Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. ... This is because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.

481 U.S. at 229. Since the sales tax exemptions did not apply uniformly to the press as a whole, this Court struck down the entire state sales tax system.

Thus, it is the potential for censorship, not merely censorial statutory language or declared censorial intention, which occasions strict scrutiny. If the tax ordinances in question were passed today, the fact that they are broadly worded or that the enacting city did not have a discernibly improper motive would not make them valid if their burden were borne primarily by a single First Amendment activity.[8] It

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[8] *See Arcara v. Cloud Books*, 478 U.S. 697 (1986). There the Court upheld the application of a generally applicable statute to a First Amendment activity, and clearly reiterated that it is the regulation's *burden*, not its language, which controls:

> In *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, since the burden of the tax inevitably fell disproportionately, in fact, almost exclusively, upon the shoulders of newspapers exercising the

is well settled that impermissible or censorial legislative motive behind a targeted tax is not a prerequisite to condemnation on First Amendment grounds. *Minneapolis Star*, 460 U.S. at 579-80, 592-93. "[A]bridgement of such rights, even though unintended, may invariably follow from varied forms of governmental action." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). The Ohio court's insistence upon evidence of actual censorship cannot be reconciled with this Court's First Amendment jurisprudence.

Because the constitutional infirmity of the tax inheres in its *actual application* to a small group of First Amendment speakers, its theoretical validity under different or earlier circumstances is irrelevant. Similarly, this Court has not hesitated to consider changed circumstances in striking down laws that were once commonly accepted as valid. *See, e.g., Arkansas Writers Project, Inc.*, 481 U.S. at 229 (50 year old state sales tax found invalid); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (state doing business statute held invalid as against racial group's new activities in state); *Brown v. Board of Education*, 347 U.S. 483 (1953) (relying upon changed societal conditions in reversing prior decision and finding the "separate but equal" doctrine unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1978) (changed circumstances served as the basis for striking down a statute banning inter-racial marriage). In sum, the fortuity of constitutionality, as enacted, is no guarantee of perpetual constitutionality, as applied.

C. Raising Revenue Is Not a Sufficient Governmental Interest to Justify the Cities' Burden on First Amendment Activities.

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constitutionally protected freedom of the press.

478 U.S. at 704 (emphasis added.)

In *Minneapolis Star*, this Court held that, by itself, an interest in raising revenue is insufficient to justify a tax selectively imposed on First Amendment activities "unless justified by some special characteristic of the press." 460 U.S. at 585-86. Rather, when fundamental liberties are at stake, the question is "whether there are 'less drastic means' available to accomplish the government's purpose." In *Minneapolis Star*, the Court found the tax constitutionally deficient because there was no showing that Minnesota lacked less intrusive alternatives:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press. [460 U.S. at 586.]

Each respondent defended their taxing ordinance on the grounds that petitioner's operations posed special problems and costs in their city which the admissions tax offset.[9] Accordingly, each city offered anecdotal evidence at trial concerning the costs of providing certain police services for petitioner's business. Each of the respondents conceded, however, that all of this evidence was gathered for the trial in this case, that the tax rate was not tailored to specifically offset

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[9] Such evidence of "special characteristics" is, of course, inconsistent with each respondent's position that there was no "singling out" of the petitioner for taxation.

costs involved, that no annual review of costs incurred and tax revenue raised was performed, and that no other business in any of the cities were ever required to pay for such services. These are not the "special characteristics of the press" envisioned by this Court in *Minneapolis Star*, 460 U.S. at 585-86.

2. THE LOWER COURTS IMPOSED AN IMPERMISSIBLE BURDEN TO PROVE AN UNCONSTITUTIONAL CENSORIAL INTENT "BEYOND A REASONABLE DOUBT."

The Ohio court of appeals opened its inquiry into the constitutionality of the admissions taxes with the following forecast of an insurmountable burden:

> In Ohio, when reviewing the constitutionality of legislation, the courts must presume the statutes to be constitutional. This presumption can only be overcome when it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." The court must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.

App. at 7a (internal citations omitted). Petitioner was thus obliged to "prove beyond a reasonable doubt" that the admissions taxes veiled a censorial motive to suppress "certain ideas." In the court's view, petitioner failed. Such a burden, however, crippled petitioner's effort to vindicate important First Amendment principles, and directly contradicted the proper allocation of burdens established by this Court.

In *United States v. Playboy Entertainment Group, Inc.*,

120 S.Ct. 1878 (May 22, 2000), Justice Kennedy emphasized the critical protective role that the Government's burden of justification plays in First Amendment jurisprudence. *Id.* at 1888-89. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," and "the usual presumption of constitutionality afforded congressional enactments is reversed." *Id.* Quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), Justice Kennedy underscored the point: "Content-based regulations are presumptively invalid."

As previously discussed, a facially neutral tax ordinance may, as here, become akin to a content-based regulation when it targets a small group of First Amendment speakers. The dangers are the same—and perhaps even more pernicious in the case of a tax with a chilling effect because society cannot ever measure the cost exacted by conduct deterred. Thus, the presumptive invalidity of the tax ordinance applies with equal force to the tax admissions ordinances here. Indeed, as Justice Souter observed in words with particular application to the volatile entertainment politics of our day, "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (quoted in *Playboy Entertainment Group, Inc.*, 120 S.Ct. at 1895) (Thomas, J., concurring).

The issue of a crippling and inappropriate First Amendment burden of proof is not confined to the state of Ohio. Indeed, in a variety of contexts, state-court insistence that a plaintiff prove unconstitutionality "beyond a reasonable doubt" to overcome "the presumption of constitutionality" is

common.[10] Whatever contexts there may be for fairly presuming the constitutionality of legislative enactments, the ease with which a reasonable presumption becomes a blanket baptism, and infects even sensitive First Amendment freedoms, warrants this Court's intervention. Some state courts frame the burden correctly—with appropriate sensitivity to the weight of fundamental constitutional freedoms[11]—but this case provides the Court with an ideal vehicle to declare a single federal constitutional standard applicable to consideration of state and local invasions of First Amendment freedoms. The Supremecy Clause requires no less. *See Felder v. Casey*, 487 U.S. 131 (1988) (under Supremecy Clause, state may not apply state notice of claim rules to defeat Federal civil rights claim merely because case was brought in state court).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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10 *See, e.g., Barham v. University of Northern Colorado*, 964 P.2d 545, 548 (Colo. Ct. App. 1998); *Wilke v. City of Appleton*, 197 Wis.2d 717, 726, 541 N.W.2d 198, 201 (Ct. App. 1995); *Matter of Unification Theol. Seminary v. City of Poughkeepsie*, 201 A.D.2d 484, 484, 607 N.Y.S.2d 383, 384 (N.Y.A.D. 2 Dept. 1994); *Rothschild v. Richland County Bd. of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992) (challenging zoning ordinance on First Amendment grounds); *Haley v. Medical Disciplinary Bd.*, 117 Wash.2d 720, 739, 818 P.2d 1062, 1072 (Wash. 1991).

11 *See, e.g., State v. Stallman*, 519 N.W.2d 903, 906 (Minn. App. 1994) ("Where no fundamental right or suspect class is involved, the challenged statute or ordinance is presumed constitutional, and the challenger must prove it is unconstitutional beyond a reasonable doubt.") (emphasis added).

Respectfully submitted,

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APPENDIX

The Supreme Court of Ohio

Regal Cinemas, Inc., Appellant,	:	Case No. 00-828
v.	:	
City of Mayfield Heights et al., Appellees.	:	E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Vorys, Sater, Seymour and Pease L.L.P.

(Cuyahoga County Court of Appeals: No. 75962)

THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 75962

REGAL CINEMAS, INC.	:	
	:	JOURNAL ENTRY
Plaintiff – Appellant	:	AND
	:	OPINION
- vs -	:	
	:	
CITY OF MAYFIELD HEIGHTS, ET AL.	:	
	:	
	:	
Defendants – Appellees	:	

Date of Announcement of Decision: March 9, 2000

Character of Proceeding: Civil appeal from Court of Common Pleas Case No. 354624

Judgment: Affirmed

Date of Journalization: _____

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JAMES M. PORTER, J.:

Plaintiff-appellant Regal Cinemas, Inc. appeals from the trial court's declaratory judgment in favor of defendants-appellees the Cities of Mayfield Heights, Middleburg Heights, Solon, Westlake and their respective municipal officials which held that admissions taxes imposed by said Cities were not unconstitutional as applied to Regal's motion picture patrons. Regal contends that said admissions taxes impermissibly encroach on its First Amendment rights of free speech and that the trial court erred to its prejudice in applying intermediate rather than strict scrutiny to its analysis of the admissions taxes; in placing the burden of proof on Regal in determining key issues; and in refusing to address Regal's request for a refund of the admissions taxes paid. We find no error and affirm.

The admissions taxes at issue were adopted by ordinances in the respective Cities some forty-five to fifty years ago between 1947 and 1953. The taxes levied by each of the Cities are similar in character and intent. Each imposes a tax (3% or 5%) on amounts paid by patrons for admission to certain recreational facilities within the respective Cities. Examples of the facilities affected include theaters, dance halls, bowling alleys, ice and roller skating rinks, golf courses, carnivals, concerts and outdoor amusement parks.

Each ordinance provides for the tax to be paid by the patron and collected by the vendor and remitted monthly to the appropriate City. If the vendor responsible for collecting and remitting that tax fails to collect or remit the tax, that vendor "shall nevertheless be personally liable to the City for the amount of such tax." If a vendor does not pay the taxes to the respective Cities so entitled, it may be convicted of a misdemeanor, fined or its principals subject to incarceration.

Regal owns and operates several theaters in the Greater Cleveland marketing area, beginning in the early to mid 1990s, including multi-screen, first-run theaters in each

of the Cities. These theaters have a seating capacity ranging from 1,849 to 3,340. The average number of patrons admitted to these theaters each month ranges from 36,358 to 48,841. From 1991 to 1996, Regal expanded from eight screens to forty-nine screens in Northeast Ohio.

The admission price paid by the patrons of the four theaters involved in this litigation varies between $4.50 and $6.75 per ticket, depending upon the time of day and type of customer. Regal bases its prices on a number of competitive factors, including the prices charged by other theaters, and other types of entertainment. Regal claimed it is unable to add the admissions tax onto its otherwise stated admission prices and maintain competitive levels. Consequently, Regal contends it pays the admissions taxes to each of the Cities out of its general operating revenues rather than charging its customers for the tax directly as the ordinances permit.

Between 1996-98, Regal has paid between 88% and 100% of the admissions taxes collected by the four Cities. Since at least April 1998, Regal has paid these admissions taxes under protest.

The Cities deposit the proceeds from the admissions taxes into their respective general revenue funds. The general funds of the Cities provide the revenues primarily for general purpose public safety type activities including police, fire, ambulance services, rubbish disposal and street maintenance available to all residents and businesses in the communities.

Regal initially filed a complaint for declaratory judgment, a motion for temporary restraining order and a motion for preliminary injunction on May 8, 1998 against Mayfield Heights and Solon and their respective mayors and finance directors. The suit contended the admissions taxes imposed by these Cities impermissibly infringed Regal's free speech rights guaranteed by the First Amendment to the United States Constitution and Article I, §11 of the Ohio Constitution. The trial court entered a temporary restraining

order that same day enjoining further enforcement and collection of the taxes from Regal. Regal filed an amended complaint on May 14, 1998, adding Middleburg Heights and Westlake and their respective mayors and finance directors as defendants. Following a hearing on June 1, 1998, the trial court overruled and dismissed Regal's application for preliminary injunction against the enforcement and collection of the admissions taxes by all defendants.

After all defendants had answered and all parties had conducted discovery, the respective parties filed cross-motions for summary judgment on September 1, 1998. The parties also filed a stipulation of facts that same day. Opposition briefs, and one reply brief were filed. All of the motions for summary judgment were denied.

A bench trial commenced October 20, 1998 and concluded the following day. At the conclusion of all evidence, the parties waived closing arguments and filed post-trial briefs on November 30, 1998. Subsequently, on January 5, 1999, the trial court issued an eight-page Memorandum of Opinion and Order finding that Regal had standing to challenge the admissions taxes but concluding that there had been no constitutional violations and entered judgment in favor of the Cities. This timely appeal ensued.

We will address Regal's assignments of error in the order asserted and together where it is appropriate for discussion.

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY APPLYING INTERMEDIATE RATHER THAN STRICT SCRUTINY TO ANALYZE THE ADMISSIONS TAXES.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS APPLICATION OF INTERMEDIATE SCRUTINY.

In Ohio, when reviewing the constitutionality of legislation, the courts must presume the statutes to be constitutional. *Hughes v. Ohio Bur. of Motor Vehicles* (1997), 79 Ohio St.3d 305, 307, citing *State ex rel. Dickman v. Defenbacker* (1955), 164 Ohio St. 142. This presumption can only be overcome when it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 47, quoting *Dickman, supra* at paragraph one of the syllabus. The court must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional. *Hughes, supra,* at 307; *State v. Dorso* (1983), 4 Ohio St.3d 60. As stated by the Ohio Supreme Court in *Arnold, et al. v. City of Cleveland* (1993), 67 Ohio St.3d 35, 38:

> In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt. *Arnold,* at 38-3. (Citations omitted.)

The right of Ohio municipalities to levy admission taxes has long been recognized. *Estelle Realty, Inc. v. City of Mayfield Hts., et al.* (1964), 176 Ohio St. 367; *Smack & Snack, Inc.* v. *City of Mayfield Heights* (1958:), 107 Ohio App. 141; *City of Aurora v. Sea Lakes, Inc.* (1995), 105 Ohio App.3d 60; *National Amusements v. City of Springdale* (May 10, 1989), Hamilton App. No. C-870627, 870634, unreported; *City of Fairlawn v. Ted Bare Enters., Inc.* (Sept. 7, 1988), Summit App. No. 13465, unreported. Regal argues, however, that because the display of motion pictures includes the exercise of free speech, the application of the Cities' ordinances is subject to strict First Amendment scrutiny rather than intermediate scrutiny. We do not agree.

The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits the enactment of any law "abridging the freedom of speech." The First Amendment protects motion pictures as fully as other mediums of expression. *State ex rel. Eckstein v. Video Express* (1997), 119 Ohio App.3d 261, 273, citing *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 445.

> As noted by the sixth Circuit:
>
> It is well settled that a law restricting speech on the basis of content is subject to strict scrutiny,, which requires that the law be necessary to serve a compelling state interest and narrowly tailored to achieve that end. It is an equally familiar principle that a law neutral with respect to content is subject to intermediate scrutiny, which is satisfied where the law furthers an important governmental interest without burdening substantially more speech than necessary.

Michigan State AFL-CIO v. Miller (C.A.6, 1997), 103 F.3d 1240, 1250. Other leading authorities support the distinction between strict and intermediate scrutiny in content-based or

content-neutral cases. See *Turner Broadcasting System, Inc. v. F.C.C.* (1994), 512 U.S. 622, 642; *DiMa Corp. v. Town of Hallie* (C.A.7, 1999), 185 F.3d 823, 826-827; *Horton v. City of Houston, Texas* (C.A.5, 1999), 179 F.3d 188, 192-193; *Phillips v. Borough of Keyport* (C.A.3, 1997), 107 F.3d 164, 172; *Seven Hills v. Aryan Nations* (1996), 76 Ohio St.3d 305, 306; *United Elec. Radio & Mach. v. State Empl. Rels. Bd.* (1998), 126 Ohio App.3d 345, 350.

The United States Supreme Court has observed that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broadcasting, supra,* at 642. Regulations that "by their terms distinguish favored speech from disfavored speech or views expressed are content based." *Id.* at 643. On the other hand, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791.

The intermediate level of scrutiny does not apply to content-based restrictions. *Turner Broadcasting, supra.* The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen* v. *Women's Health Center, Inc.* (1994), 512 U.S. 753, 763, 114 S.Ct. 2516, 2523, 129 L. Ed.2d 593, 606, quoting *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L. Ed.2d 661, 675; *City of Seven Hills, supra.* Furthermore, government regulations that apply evenhandedly to all speakers weigh in favor of finding content neutrality. *Horton, supra.*

We agree with the trial court's findings that the Cities' admissions taxes are content neutral and therefore, subject to intermediate, not strict scrutiny. There is nothing in the language of the relevant ordinances which refers to content of films shown. There is nothing in the history of the

adoption of these ordinances, nor was there any evidence at trial that the Cities have attempted to or threatened to affect in any fashion the content of the films Regal shows. In short, there exists no evidence of legislative intent to suppress or restrict Regal's right of free speech. We acknowledge the fact that Regal pays most, if not all, of the admissions taxes received by the Cities. However, this is not because the taxes are focused on the movie theaters, but simply because market forces have reduced many of the other taxable activities. Accordingly, Regal was entitled to intermediate scrutiny of the ordinances' effect, as the trial court gave it.

Regal's reliance on *Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue* (1983), 460 U.S. 575, in arguing for "strict scrutiny," is misplaced. In *Minneapolis Star,* a special ink and paper use tax was imposed by the Minnesota legislature. The tax at issue was "without parallel in the State's tax scheme." Id. at 582. The tax targeted specific publishers in the publishing business and exempted smaller print organizations. The Supreme Court found the tax violative of the First Amendment, not only because it singled out the press, but also because it targeted the largest newspapers and exempted the smaller publishers. The tax was content-based which resulted in the Court's use of a strict standard of review.

In *Leathers v. Medlock* (1991), 499 U.S. 439, 448, the United States Supreme Court explained that strict scrutiny is warranted when a content-based regulation threatens to "distort the market for ideas." In *Turner Broadcasting Systems, Inc. v. F.C.C.* (1994), 512 U.S. 622, 660, the Court further expressed that heightened scrutiny should be applied only when the regulation was "structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas."

In the instant case, the Cities' admissions taxes are content neutral and are applicable to numerous activities where patrons are subject to the tax; including theaters,

athletic activities, golf courses, dance halls, circuses and amusements parks. The tax applies to all theater patrons regardless of film content and the tax does not prohibit or restrict in any fashion the display of motion pictures. See *Associated Film Distribution Corp. v. Thornburgh* (C.A.3, 1986), 800 F.2d 369 (strict scrutiny not an appropriate standard of review when regulation of movie industry in Pennsylvania did not infringe upon movie making activities like the state tax upon ink and paper in *Minneapolis Star).* We find no evidence that the admissions taxes in question threaten to "distort the market for ideas" or raise "suspicions that their object was, in fact, the suppression of certain ideas." Therefore, we agree with the trial court that intermediate scrutiny was the proper test to be applied to the admissions taxes at issue here.

Regal also argues that the trial court improperly applied the intermediate scrutiny test. We find no merit to this contention. In *United States v. O'Brien* (1968), 391 U.S. 367, the Court set forth the intermediate scrutiny test. Under *O'Brien*, a content-neutral regulation will be sustained if it meets the following three requirements: (1) the regulation furthers an important or substantial government interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction of alleged first amendment freedoms is no greater than necessary to further that interest. *Id.* at 377, quoted and followed in *Turner Broadcasting, supra,* at 662.

The Cities' admissions taxes further an important government interest as they raise valuable revenue for traffic, crowd control and security at venues which attract a large number of people in a congested area at the same time. Such taxes also further the important government interest of preserving peace and order within the Cities. It is undisputed that raising revenue is a substantial concern for the respective Cities. There was also significant evidence that Regal's theaters placed additional demands upon the Cities. Lt.

Joseph Connelly of the Mayfield Heights Police Department testified that during the times when Regal Cinema had large crowds, the police officers patrolling the area were instructed to give it "special attention." Lt. Connelly testified that the specific hours and length of movies at a movie theater create an ideal opportunity for crime as cars and trucks are left unattended in the lot during those times with little traffic in the lot.

Capt. Guy Turner of the Westlake Police Department testified that assembly-type uses where a large group of young people gather require more police attention because "young people tend to be more involved in crime, both as suspects and as victims." He also testified that automobile theft is one of the most frequent crimes in Westlake and that there are a large number of automobiles left unattended for extended periods of time while their owners are attending a movie. Such areas with unattended automobiles and groups of young people "are places that we want to hit harder in terms of patrol." Sgt. Robert A. Frollo of the Middleburg Heights Police Department similarly testified that the operation of the Regal Cinema in the City requires a greater police response than other businesses located there.

Wayne F. Doberstyn, Solon Assistant Chief of Police, testified that "about half a million" people per year are drawn to the Regal Cinema in Solon requiring special attention from the police department. He testified that, due to the "atrocious" weekend night traffic, an additional access road had to be built in order to get emergency equipment back to Regal Cinema if needed. Doberstyn testified that a large amount of juveniles congregate in the parking lot and the department receives many calls of "juveniles loitering, fights breaking out, assaults" and some gang activity. In fact, in the summer of 1996, as a result of the juvenile problem, the City was forced to bring in approximately half of its police force on two or three consecutive Friday nights to "show a police presence in the area and to discourage this kind of behavior."

When asked if any other business in Solon creates the special safety problems or burdens with juveniles meeting as Regal Cinema, Asst. Chief Doberstyn answered: "Not even close, no." He also stated that no other business establishment in Solon has "the special problems and burdens created by a large influx of people at very specific and short periods of time, large obscured parking lots, juvenile congregation, nighttime gridlock and large amounts of cash at night that would be analogous at all to the burdens that are placed upon our city and our city's safety forces as Regal."

Regal argues nevertheless that simply because businesses which attract large attendances cost the Cities more money than other businesses, raising funds to cover those expenses "can be accomplished without burdening Regal's First Amendment freedoms." In short, Regal argues that the ordinances are not sufficiently tailored to pass constitutional muster, *i.e.*, the Cities should impose the admissions tax or similar revenue generating taxes on all business so that they proportionately share the tax burden. We are not persuaded.

This presents the interesting question of whether the regulation's alleged incidental restriction on free speech is greater than is essential to further the government's interests. However, to satisfy the *O'Brien* standard, a regulation need not be the least speech restrictive means of advancing the Cities', interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the *** regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward, supra,* at 799, quoting *United States v. Albertini* (1985), 472 U.S. 675, 689.

Absent the admissions taxes, the Cities would have less revenue to deal with the secondary effects of commercial entertainment at which the taxes are aimed. We find it is "within the legislature's legitimate purview to conclude that such secondary effects as traffic are likely to adhere to all commercial entertainment." *National Amusements, Inc. v.*

Town of Dedham (C.A.1, 1995), 43 F.3d 731, 744. Even though it is undisputed that Regal pays a significant amount of the admissions taxes collected by the Cities, such taxes were never imposed on Regal. They were imposed on Regal's patrons who pay the admission charge to enter its facilities. Furthermore, we find that the taxes are directly related to Regal's significant safety and traffic requirements. Several police officers from the Cities testified that the large crowds and automobiles generated by Regal increase the special traffic and safety burdens on the Cities beyond ordinary business or commercial activities. Accordingly, we find that the Cities' interest in generating revenue for such "special attention" would be achieved less effectively absent the admissions taxes.

Furthermore, it must be recognized that there is no incidental effect on Regal's alleged free speech rights. There is no evidence that any City has used the admissions taxes to influence film content and the ordinances on their face are obviously content neutral. We do not understand that Regal is arguing that a 3% or 5% tax on ticket sales forecloses cinematic expression or any other means of expression guaranteed by the First Amendment. *See, e.g., One World One Family Now v. City and County of Honolulu* (C.A.9, 1996), 76 F.3d 1009, 1013. Regal's own stipulations refute any suggestion that its freedom of expression has been harmed by the ordinances. The evidence reflected that Regal has grown its business six times over in the number of screens displayed in less than seven years despite the admissions taxes.

Assignments of Error I and II are overruled.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REQUIRING REGAL TO PROVE THAT THE ADMISSIONS TAXES ARE FACIALLY INVALID AND WERE INTENDED TO INFRINGE REGAL'S FREE SPEECH RIGHTS.

Regal argues that part II(F) of the trial court's opinion indicates that the court did not conduct an "as-applied" analysis to its constitutional claims. We do not agree.

An ordinance may be facially unconstitutional in one of two ways: "either it is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *Members of City Council v. Taxpayers for Vincent* (1984), 466 U.S. 789, 796. A successful challenge to the facial constitutionality of a law invalidates the law itself.

An as-applied challenge contends that the law is unconstitutional "as-applied" to the litigant's particular speech activity, even though the law may be capable of valid application to others. *Id.* at 803. An as-applied challenge does not implicate the enforcement of a law against third parties. Contrary to a facial challenge, a successful "as-applied" challenge does not render the law itself invalid but only the particular application of the law.

Based on the record before us, we find that Regal correctly contends that its claims are "as-applied" challenges to the admission taxes. Regal is asserting that the admissions taxes imposed by the Cities impermissibly infringe on its free speech rights guaranteed by the First Amendment. Nowhere does Regal assert that the taxes are unconstitutional as they are applied to other facilities subject to the tax. However, when the regulation at issue is content-neutral, as here, the court must apply the same *O'Brien* test regardless of whether Regal has brought a facial challenge or an "as-applied" challenge to the regulation.

We find that the trial court's conclusions were appropriate and in accordance with the *O'Brien* requirements. Having already found that the trial court correctly concluded, pursuant to *O'Brien*, that the admissions taxes furthered an important government interest and produced no incidental effect on Regal's alleged free speech rights, Regal's claim fails regardless of whether it was a facial or "as-applied" challenge.

Assignment of Error III is overruled.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REQUIRED REGAL TO PROVE BEYOND A REASONABLE DOUBT THAT THE ADMISSIONS TAXES ARE UNCONSTITUTIONAL.

In this assignment of error, Regal asserts that the trial court erred in requiring it to prove beyond a reasonable doubt that the admissions taxes are incompatible with the United States Constitution. We do not agree.

It is well established in Ohio that "'[a]ll legislative enactments enjoy a presumption of constitutionality, and 'the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.'" *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1996), 77 Ohio St.3d 338, 345-346, quoting *Dorso*, *supra*. Furthermore, this presumption can only be overcome by proof beyond a reasonable doubt that the legislation and the Constitution are clearly incompatible. *Doyle, supra*.

We find that the trial court correctly found that Regal failed to meet its burden of proof that the Cities' admissions taxes unconstitutionally infringed upon its right to exercise free speech. As discussed fully above, the Cities' admissions taxes were supported by an important government interest unrelated to the suppression of free expression and they did

not unnecessarily restrict Regal's alleged free speech rights. Under any standard of proof, the trial court's findings were supported by the record. Furthermore, this Court "is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92; *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614.

Assignment of Error IV is overruled.

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED TO ADDRESS REGAL'S REQUEST FOR A REFUND OF ADMISSIONS TAXES PAID.

Given our disposition of the previous assignments of error, this assignment of error is moot and will not be addressed. App.R. 12(A)(1)(c).

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J. and
MICHAEL J. CORRIGAN, J., CONCUR.

JAMES M. PORTER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This

decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

REGAL CINEMAS, INC
Plaintiff(s)

CASE NO(S). 354624

vs

CITY OF MAYFIELD HEIGHTS, ET AL.
Defendant(s)

MEMORANDUM OF OPINION AND ORDER

FRIEDMAN, J:

I. Introduction

In the late 19409 and early 1950s the four municipal defendants herein enacted ordinances imposing an admissions tax on a wide range of recreational activities conducted within their respective borders. These ordinances, which are all substantially identical (except as to the rate of the tax imposed), require business entities to collect the admissions tax from their patrons and to remit the tax to the municipalities.[1] During the 1990s, plaintiff established movie theatre businesses within the territorial jurisdiction of

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[1] The Defendents apparently are not the only communities in Cuyahoga County that impose such an admission tax; however, they are the only communities in which plaintiff's movie theatres are virtually the only businesses subject to that tax. In Mayfield Heights, for example, besides plaintiff only the Discovery Zone and the Locust Grove par-three golf course are subject to the tax; evidence established that between 88% and 100% of admissions tax revenues in each of the defendant cities is derived from plaintiff's theates.

each of the defendants. On May 8, 1998, the instant lawsuit was filed, claiming that these admissions tax ordinances impermissibly infringe plaintiff's free speech rights guaranteed by the First Amendment to the United States Constitution and by Article 1, Section 11, of the Ohio Constitution.[2] As was stipulated at trial (Joint Exhibit 1 and Plaintiff's Exhibit 2), the plaintiff has declined to collect the taxes from its customers, preferring to absorb those monies and to remit the taxes owed to the defendant cities under protest. The case proceeded to trial to the Court on October 20, 1998, and post-trial briefs were filed by all parties on November 30, 1998.

II Discussion and Analysis

A. Standing

In each instance the admissions tax (five percent in Mayfield Heights and three percent in Middleburg Heights, Solon, and Westlake) is levied upon every person who pays an admission charge to any place, including but not restricted to theatres, dance halls, amphitheaters, auditoriums, stadiums, athelic pavilions and fields, golf courses, golf driving ranges, bowling alleys, ice-skating rinks, roller skating rinks, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks and other attractions. Within each community the tax rate remains uniform as to all subject activities. Further, the tax is to be collected at the time the admission charge is paid by the person seeking admission to any place, and is to be reported and remitted by the person receiving the tax to the respective defendant cities in monthly installments. Defendants contend that plaintiff lacks standing, in that only

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[2] It is plaintiff's First Amended Complaint, filed May 14, 1998, that is considered for the purposes of this Memorandum of Opinion and Order. The amendment added as defendants the Cities of Middelburg Heights and Westlake, their Mayors, and their Finance Directors.

taxpayers can complain about tax collection. *Board of Education of Hopewell v. Gay* (1901), 64 Ohio St. 434. In opposition, plaintiff asserts that it is personally liable to each city for the amount of the tax and that, if the city does not receive the tax, the vendor is subject to penalties, including a possible jail sentence and/or a fine. In a situation such as the one *sub judice*, where failure to remit the tax subjects the vendor to a penalty, that vendor must be accorded a fair opportunity to challenge the validity of the tax. See *McKesson Corporation v. Div. of Alcoholic Beverage and Tobacco* (1990), 496 U.S. 18. Moreover, plaintiff claims that this tax creates an adverse competitive impact by increasing its cost of operating in the defendant communities compared to other exhibitors whose theatres are located in communities without such tax.[3] The Supreme Court has held that this constitutes a sufficient basis to confer standing. *McKesson,* at 43. Therefore, this Court finds that plaintiff, Regal Cinemas, Inc., indeed has standing to bring the instant declaratory judgment action.

B. Presumption of Validity

In Ohio, courts are required to presume the constitutionality of legislative enactments. *State, ex rel Jackman v. Court of Common Pleas* (1967), 9 Ohio St. 2d 159. This presumption may be overcome only when it is demonstrated by proof beyond a reasonable doubt that the legislation is clearly incompatible with the Constitution. *State, ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142. In their analysis courts must apply all rules of construction so as to uphold the validity of the statue or

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[3] Plaintiff contends that it faces potential competitive disadvantage resulting from defendants' taxes, suggesting that competing exhibitors, with theatres in other communities without admissions taxes, can reap a higher profit at the same ticket price. However, there is no evidence before the Court as to what cities, in which competing cinemas are located, do not impose admissions taxes.

ordinance. *State v. Dorso* (1983), 4 Ohio St. 3d 60. All the foregoing principles were recently reiterated in *Arnold v. City of Cleveland* (1993), 67 Ohio St. 3d 35.

C. The First Amendment

The First Amendment of the U. S. Constitution prohibits the enactment of any law "abridging the freedom of speech, or of the press ... and is applicable to state and municipal action pursuant to the Fourteenth Amendment." *Douglas v. Jeannette* (1943), 319 U.S. 157; *Lovell v. Griffin* (1938), 303 U.S. 444. There is no real dispute that Regal Cinemas, Inc., as a displayer of motion pictures, engages in conduct protected by the First Amendment guaranties of freedom of speech and press.

D. Test of Constitutionality

When speech and nonspeech elements are combined in the course of conduct being regulated, and when special circumstances warrant, the appropriate test for the Court to apply is that of "intermediate scrutiny" as articulated in *United States v. O'Brien* (1968), 391 U.S. 367, 376. A contested government regulation can be sustained:

> If it is within the constitution power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of freee expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien at 377. The various places affected by the municipal admissions tax involve both speech and nonspeech activities.

Defendants assert that there is a recognized strain upon municipal services associated with the operation of the theatres. To this end they have submitted affidavits and police department records and have put forth testimony in

support of their assertion that the plaintiff's theatres experience an increase in traffic, crowd control and security concerns compared to those associated with the other commercial enterprises in the same shopping centers or malls. The evidence at trial demonstrated that the cities experienced an increase in crowds and congestion in parking lots at the theatre locations at designated times (often outside of daylight hours and on weekends), and that a significant number of the patrons come from outside of the municipality.[4] It remains uncontested that plaintiff's theatres are patronized in part by people living outside the municipal boundaries, whose tax dollars are directed elsewhere and thus do not help defray these added expenses incurred by the city in which the theatre is located.

Plaintiff raises the specter of an admissions tax being used as a weapon to dictate the content of films it may show with threats to raise the tax to draconian levels unless certain films were, or were not shown. The Court is concerned, of course, as to this potential for abuse. However, it is noted there is absolutely no evidence before the Court of any actual or implied threats by any of these communities to tie tax rates to the content of the films being exhibits by plaintiff. The admissions tax applies equally to viewers of both PG films and R-rated ones. *See Associated Film Distribution Corp. v. Thornburgh* (3d Cir. 1986), 800 F. 2d 369, 375. Clearly, a Court may intervene only in the face of a challenge

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[4] Mike Levesque, Vice-President of Operations for the Northern Region of Regal Cinemas, testified that the plaintiff routinely hires off-duty, uniformed police officers as security guards on weekends only; on cross-examination, however, he conceded that both their hours and their duties are limited, and that plaintiff relies upon the local emergency services (police, fire, EMS) for any extraordinary situations. Tr., 66-7. He also conceded, on cross-examination, that the Regal Cinema in Solon, together with its adajacent food court, have caused a significant increase in traffic. Tr., at 85.

to an actual constitutional violation, not to the mere possibility that one eventually may ensue.

E. Constitutionality of the Ordinances at Issue

Plaintiff relies heavily upon the case of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue* (1983), 460 U.S. 575, as wellas California cases which follow the United States Supreme Court's lead. In *Minneapolis Star,* The Minneapolis Star and Tribune Company filed an action in state court to recover a refund of certain use taxes it had paid on the cost of ink and paper used to produce its newspaper. In effect, of course, that tax was imposed only upon products necessary to exercise the right of free speech. In practice, the use tax was paid by only a small percentage of publishers and the Minneapolis *Star* itself paid two-thirds of the total tax collected. Although there was no evidence of intent, the Court found this to be a discriminatory tax scheme which could only be upheld if the differentiai taxation was necessary to achieve a compelling state interest. Minnesota's stated interest was to generate general revenue. Though held to be "critical", said interest did not justify disparate tax treatment when a general business tax would suffice.

More on point is the California case of *Festival Enterprises, Inc. v. City of Pleasant Hill* (1986), 182 Cal. App. 3d 960. There the Court was critical of the municipality's reliance on general revenue as the sole justification for the admissions tax and noted the lack of any evidence of the increased burden on services such as police protection, street repair or sanitation collection. The Court noted specifically that:

> There is no contention that the additional revenue is needed because of the increased use of city services required by virtue of the operation of plaintiff's theatres, ie., police protection, street repair or sanitation collection and we agree with the trial court

> that it presents an impermissible differential burden on plaintiff's businesses in violation of the First Amendment.

Id. at 965.

The factual scenario and the presentation of proof before this Court are distin guishable from the cited cases in several crucial respects:

a) Unlike *Festival Enterprises, supra,* the defendant cities here have supplied evidence of the special circumstances occasioned by the operation of the theatres within their boundaries. There was testimony from local officials from all four communities, both anecdotal and statistical, confirming that they have experienced significant increases in need for police and other emergency services--ranging from rowdiness, to car theft and other crimes, to calls to assist movie patrons who are locked out of their cars, or to escort Regal employees to the bank to deposit the day's receipts. There was further testimony from the finance director of all four cities tending to quantify the costs involved in providing these increased services. Despite plaintiff's objections, such evidence is not required to be developed with mathematical precsion.

b) *Festival Enterprises* involved a tax ordinance imposed after the plaintiff's theatres were operating and, as the court noted: "...council members had no other businesses in mind when it passed the ordinance." Under the circumstances the court held that it "cannot ignore the present unfairness and rely only upon a hypothetical situation that might save the tax scheme in the future." *(Id.,* at 604) To the contrary, the ordinances challenged herein were enacted in the 1940s and early 1950s and intended to apply to a wide range of then-existing or potential businesses; thus the municipalities cannot be held beyond a reasonable doubt to have singled out this plaintiff that arrived on the scene only in the 1990's. Further, unlike *Minneapolis Star*, in which the

use tax specifically targeted paper and ink, defendants' admissions taxes are not directed at the tools of the trade (such as projectors or film). Rather, the focus in these ordinances is directed at recreational business activities generally and only incidentally impacts protected speech activities.

c) This Court cannot ignore the fact that, when it was considering building its operations in each of the municipalities, plaintiff knew that the admissions tax ordinances already had been on the books for over forty years. (Defendants' Exhibits A, B and E; Transcript, at 51-55; 127-130)

d) Regal is a "volunteer" of sorts in terms of the payment of the admissions tax. Each of these ordinances makes the patron, not the theatre, the taxpayer; the theatre is merely obligated to collect and remit the taxes paid by the patrons. Regal has chosen not to collect the tax but rather to pay the tax out of its own revenues. Although it is acknowledged that competition and the market dictate the ticket price plaintiff can afford to charge and still survive, the evidence fails to establish that these taxes are so high as to be confiscatory.

F. Constitutionality as a Moving Target

The parties and this Court are in agreement that plaintiff presently pays the lion's share of the admission tax in each of the defendant communities. However, this is not because the ordinances target movie theatres alone, while exempting other recreational activities. To the contrary, as already has been noted, the tax is imposed upon all such activities for which admission is charged, subject only to a few specific exemptions (such as those activities conducted by schools, churches, and the like). Rather, it is market forces that have led to plaintiff's theatres currently being the only covered activities in these cities.

Evidence before the Court establishes that this was not the case as recently as ten years ago, and it may not be so at any specific time in the future.[5] Golf courses, theatres, amusement parks, and sports complexes are built, prosper, wither, and are closed over time. One has merely to look at the postwar boom and bust of both bowling and miniature golf, or the bust and recent boom of movie theatres, to realize that this landscape is constantly changing. Businesses that are subject to these taxes may open and close at any time; to accept plaintiffs theory, the Court would be required to find that the same tax that is unconstitutional today is not so tomorrow, or that the same tax that is permissible in one community is prohibited next door–solely because that second city happens to have a driving range that is open six months of the year.

It must be conceded that a tax which is neutral on its face nevertheless may violate First Amendment free speech rights, if the neutral language of the ordinance is belied by other laws or regulations. For example, even though these ordinances on their face apply to a wide range of activities, if zoning or other ordinances effectively barred all such activities *other than* movie theatres, then the Court would have to hold that this tax nevertheless constitutes a *de facto* to interference with plaintiff's free-speech rights. In the case before the Court, however, plaintiff does not allege– nor is there evidence to show–that any of the defendants have acted to restrict other businesses that might be subject to the tax in their communities.

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[5] According to testimony of Robert Tribby, Finance Director for the City of Mayfield Heights, on redirect, at various times in past years there were in that community: a General Cinemas theatre, two bowling alleys, a 27-hole golf course, a miniature golf course, and other activities– all subject to the admissions tax. (Tr. 148) Similarly, Sgt. Robert Frollo, of the Middleburg Heights Police Department, testified that the Mercury Theatre, which operated for many years on Pearl Road in that city, closed down several years ago. (Tr. 286-8)

No, the Constitution must not be held hostage to the vagaries of the marketplace. History shows that these four ordinances in fact were fashioned so as to impose an admission tax uniformly upon a broad range of business activities, both protected and unprotected. The record does not suggest that these ordinances constitute an invidious attempt to restrict First Amendment rights, or that they are anything other than a legitimate attempt to recoup a portion of the increased costs associated with a business which, by its very nature, brings large numbers of people into the community during limited periods, primarily during evenings and weekends. They do not become unconstitutional simply because at this one point in time the only activities subject to those taxes are plaintiff's movie theatres.

III. Conclusion

In conclusion, the Court finds as follows:

1. Plaintiff does have standing to challenge the tax ordinances *sub judice*.
2. In considering the constitutionality of these ordinances, the Court must require the plalintiff to establish, by evidence beyond a reasonable doubt, that the taxes imposed constitute an impermissible infringement of their First Amendment free speech rights.
3. While the evidence is uncontroverted that, in the four defendant communities and at this time, the lion's share of the burden of collecting and remitting this tax falls upon it, plaintiff nonetheless has failed to establish that the tax was imposed so as to target free-speech activities; rather, the evidence before the Court makes it clear that it is market forces, rather than the intent of the defendants, that have led to this situation at the present time. Furthermore, the nature of those same market forces makes it likely that, over time, the share of the tax burden to be borne on plaintiff's shoulders in any of these

communities will shift to other entertainment, sporting, or similar activities.

4. Accordingly, plaintiff has failed to meet its burden of proving, beyond a reasonable doubt, that the defendant municipalities' admissions taxes infringe upon the free speech rights guaranteed by the U.S. and Ohio Constitutions. Plaintiff thus is not entitled to the declaratory judgment prayed for in its Amended Complaint.

By holding in favor of sustaining the validity of the city ordinances, this Court need not address plaintiff's additional claims with respect to: injunctive relief, refunds of taxes previously paid, or attorneys' fees and costs.

IT IS SO ORDERED.

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Judge Stuart A. Friedman

Dated: January 5, 1999

SERVICE

Copies of the foregoing Memorandum of Opinion and Order were sent via U.S. mail to all counsel of record this date:January 5,1999.

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Judge Stuart A. Friedman

The Constitution of the United States

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for

payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE THREE – Taxation

Chap. 791. Admissions Tax.
Chap. 793. Earned Income Tax.
Chap. 795. Transient Guest Tax.
Chap. 797. Motor Vehicle License Tax

CHAPTER 791

Admissions Tax

791.01 Defintions.
791.02 Imposition and rate of tax.
791.03 Exemption from tax.
791.04 Collection of tax; interest charges.
791.05 Certificates of registration; fee.
791.06 Certificates of registration for temporary amusements.
791.07 Rules and regulations.
791.08 Effective date.
791.09 Confidentiality of Information.
791.10 Violations
791.99 Penalty.

CROSS REFERENCES

Power to tax – See Ohio Const., Art. XVIII, §3; CHTR. Art II

Establishment and appointment of Tax Administrator –see ADM. 135-01

Safety of crowds attending live entertainment performances - see GEN. OFF. 535.18

Carnivals, circuses and other shows - see B.R. & T. Ch. 707

Dance halls - see B.R. & T. Ch 715

791.01 DEFINITIONS.

As used in this chapter:

(a) "Admission charge" means, in addition to its usual and ordinary meaning, a charge made for season

tickets or subscriptions; a cover charge or a charge made for the use of seats and tables, reserved or otherwise, and similar accommodations; a charge made for food and refreshments in any place where any free entertainment, recreation or amusement is provided; a charge made for the rental or use of equipment or facilities for purposes of recreation or amusement, or a combined charge where the rental of equipment or facilities is necessary to the enjoyment of the privileges for which a general admission is charged; and a charge made for automobile parking where the amount of the charge is determined according to the number of passengers in an automobile.

(b) "Person" means any individual, receiver, assignee, firm, copartnership, joint venture, corporation, company, joint stock company, association, society or group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit or otherwise.

(c) "Place" includes, but is not restricted to, theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, golf courses, golf driving ranges, bowling alleys, ice-skating rinks, roller-skating rinks, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks and such attractions as merry-go-rounds, Ferris wheels, dodge'ems, roller coasters and observation towers.

(Ord. 1958-25. Passed 4-14-58.)

791.02 IMPOSITION AND RATE OF TAX.

There is hereby levied and imposed upon every person who pays an admission charge to any place, including a tax on persons who are admitted free of charge or at reduced rates to any place to or for which other persons pay a charge or a regular higher charge for the same or similar privileges. or accommodations:

(a) A tax of five percent on the amount paid for admission to any place, including admission by season ticket or subscription;

(b) A tax of five percent on the excess of the amount paid for tickets or cards of admission to theaters, operas and other places of amusement, sold at newsstands, hotels and places other than the ticket offices of theaters, operas or other places of amusement, over and above the amount representing the established price therefor at such ticket offices, such tax to be returned and paid in the manner provided in Section 791.04 by the person selling the ticket;

(c) A tax of five percent on the amount paid for admission to any public performance for profit at any roof garden cabaret or other similar entertainment if the charge for admission is in the form of a service charge, cover charge or other similar charge;

(d) A tax of five percent on the amount paid as annual membership dues by every club or organization maintaining a golf course; and

(e) A tax of five percent on green fees collected by golf courses either under club or private ownership.

791.03 EXEMPTIONS FROM TAX.

(a) No tax shall be levied under this chapter with respect to any admission, all the proceeds of which inure:

(1) Exclusively to the benefit of religious, educational or charitable institutions, societies or organizations, if no part of the net earnings thereof inures to the benefit of any private stockholder or individual;

(2) Exclusively to the benefit of persons in the military or naval forces of the United States, or of National Guard organization reserve officer associations or posts or organizations of war veterans, or auxiliary units or societies of any

such posts or organizations, if the posts, organizations, units or societies are organized in the State, and if no part of their net earnings inures to the benefit of any private stockholder or individual;

(3) Exclusively to the benefit of persons who serve in the military or naval forces of the United States and are in need;

(4) Exclusively to the benefit of members of the police or fire departments of any municipal corporation, or the dependents or heirs of such members; or

(5) Exclusively to the benefit of the general revenue fund of any municipal corporation or exclusively to the benefit of any fund of any municipal corporation under the control of a recreation commission. This exemption from the tax, however, shall not be allowed in cases wherein the admission price is ten dollars ($10.00) or more.

(b) The exemption from the tax provided by subsection (a) hereof shall not be allowed in the case of admissions to wrestling matches, prize fights or boxing, sparring or other pugilistic matches or exhibitions, or in the case of admissions to any athletic game or exhibition, the proceeds of which inure wholly or partly to the benefit of any high school, academy, preparatory school or other school, wherein the admission price is ten dollars ($10.00) or more, or which inure wholly or partly to the benefit of any college or university.

(c) Immediately after the event for which an exemption from the admission tax has been allowed, the treasurer of the institution, society or organization for whose benefit such event was held shall file an itemized statement with the Director of Finance

setting forth the amount of money actually received by the treasurer, together with the expenses of promoting and conducting the event. The statement shall be used as a basis for subsequent requests for exemption from the admission tax for the benefit of the institution, society or organization. If the statement shows a disproportionate expenditure for promoting and conducting the event, in relation to the profits, if any, no such exemption shall thereafter be allowed to the institution, society or organization.

(d) The exemption from the tax provided in subsection (a) hereof shall not be allowed to any institution, society or organization which does not control the sale of admissions to the event for which the exemption is requested. An exemption shall not be allowed where talent, services or other items are compensated for on a percentage basis, if the percentage results in a payment in excess of the flat rate ordinarily charged for the same talent, services or other items.

(Ord. 1994-36. Passed 12-12-94.)

791.04 COLLECTION OF TAX; INTEREST CHARGES.

Every person receiving any payment on which a tax is levied under this chapter shall collect the amount of the tax imposed from the person making the admission payment. The tax required to be collected under this chapter shall be deemed to be held in trust by the person required to collect it until it is paid to the Director of Finance as herein provided. Any person required to collect the tax imposed under this chapter who fails to collect it, or, having collected it, fails to remit it to the Director in the manner prescribed by this chapter, whether such failure is the result of his or her own act or the result of acts or conditions beyond his or her control, shall nevertheless be personally liable to the City for

the amount of the tax and shall, unless the remittance is made as herein required, be guilty of a violation of this chapter.

The tax imposed under this chapter shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the Director in monthly installments and remittances on or before the tenth day of the month next succeeding the end of the monthly period in which the tax is collected or received. The payment or remittance of the tax collected may be made by check, unless payment or remittance is otherwise required by the Director, but the payment by check shall not relieve the person collecting the tax from liability for payment and remittance of the tax to the Director unless the check is honored and is in the full and correct amount.

The person recelring any payment for admissions shall make out a return upon such forms and shall set forth such information as the Director may require, shall show the amount of the tax upon admissions for which he or she is liable for the preceding monthly period and shall sign and transmit the return to the Director with a remittance for that amount. The Director may, at his or her discretion, require verified annual returns from any person receiving admission payments, setting forth such additional information as he or she believes necessary to determine correctly the .amount of tax collected and payable.

Whenever any theater, circus, show, exhibition, entertainment or amusement makes any admission charge which is subject to the tax herein levied, and the same is of a temporary or transitory nature, of which the Director shall be the judge, the Director may require the report and remittance of the admission tax immediately upon the collection of the charge, at the conclusion of the performance or exhibition, at the conclusion of the series of performances or exhibitions or at such other times as the Director determines. Failure to comply with any requirement of the Director as to report and

remittance of the tax as required shall be a violation of this chapter.

The books, records and accounts of any person collecting a tax herein levied shall, as to admission charges and tax collections, be, at all reasonable times, subject to examination and audit by the Director. If the tax imposed by this chapter is not paid when due, there shall be added, as part of the tax, interest at the rate of one percent per month from the time when the tax became due until the tax is paid. (Ord. 1953-51. Passed 7-20-53.)

791.05 CERTIFICATES OF REGISTRATION; FEE.

Any person conducting or operating any place where an admission charge is made for entrance shall, on a form prescribed by the Director of Finance, make application to and procure from the Director a certificate of registration, the fee for which shall be five dollars ($5.00). The certificate shall be valid until December 31 of the year in which it is issued. The certificate of registration, or duplicate copies thereof, to be issued by the Director without additional charge, shall be posted in a conspicuous place in each ticket or box office where tickets of admission are sold.

791.06 CERTIFICATES OF REGISTRATION FOR TEMPORARY AMUSEMENTS.

Whenever a certificate of registration is obtained for the purpose of operating or conducting a temporary or transitory amusement, entertainment or exhibition by persons who are not the owners, lessees or custodians of the building, lot or place where the amusement is to be conducted, the tax imposed by this chapter shall be reported and remitted as provided in Section 791.04 by the owner, lessee or custodian, unless paid by the person conducting the amusement. The applicant for a certificate of registration for such purpose shall furnish with the application the name and address of the owner, lessee or custodian of the premises upon which the amusement is to be conducted, and the owner, lessee or

custodian shall be notified by the Director of Finance of the issuance of the certificate and the joint liability for collection and remittance of the tax.
(Ord. 1953-51. Passed 7-20-53.)

791.07 RULES AND REGULATIONS.

The Director of Finance may adopt rules and regulations not inconsistent with this chapter for carrying out and enforcing the payment, collection and remittance of the admissions tax levied in this chapter. A copy of the rules and regulations shall be posted in a manner provided by ordinance at least once before they become effective and copies shall be made available in the office of the Director. Failure or refusal to comply with any such rules and regulations shall be deemed a violation of this chapter.

Until such time as rules and regulations are promulgated under this section, the rules and regulations of the State Department of Taxation relating to admission taxes in effect on August 31, 1947, except as they may conflict with the provisions of this chapter, shall be deemed to be, rules and regulations hereunder.
(Ord. 1953-51. Passed 7-20-53.)

791.08 EFFECTIVE DATE.

The tax herein levied and imposed shall be collected and paid after April 30, 1948.
(Ord. 1953-51. Passed 7-20-53.)

791.09 CONFIDENTIALITY OF INFORMATION.

All returns and information relating to the business of any person required to collect the tax imposed by this chapter and coming into the possession of the Director of Finance and his or her agents and employees shall be held confidential. No person shall make any disclosure thereof unless he or she is ordered by a court of competent jurisdiction to do so, except that the Director may furnish the

Bureau of Internal Revenue, Treasury Department of the United States, with copies of returns filed.
(Ord. 1953-51. Passed 7-20-53.)

791.10 VIOLATIONS.

No person charged by this chapter with the duty of collecting or paying the tax imposed by this chapter shall willfully fail or refuse to:

(a) Charge and collect or pay such tax;

(b) Make a return to the Director of Finance as required by this chapter;

(c) Permit the Director or his or her duly authorized agent to examine books and other records upon any premises where they are kept to the extent necessary to verify any return made or to ascertain and assess the tax imposed by this chapter if no return was made; or

(d) Maintain and keep books and other records for three years or such lesser or greater time as may be permitted or required by the Director.
(Ord. 1953-51. Passed 7-20-53.)

791.99 PENALTY.

(a) Whoever violates or fails to comply with any of the provisions of this chapter, for which no penalty is otherwise provided, is guilty of a minor misdemeanor for a first offense and shall be fined not more than one hundred dollars ($100.00). For a second or subsequent offense, such person is guilty of a misdemeanor of the third degree and shall, if an organization, as set forth in Section 505.08 of the General Offenses Code, be fined not more than three thousand dollars ($3,000), or shall, if an individual, be fined not more than five hundred dollars ($500.00) or imprisoned not more than sixty days, or both, for each offense.

(b) Whoever violates Section 791.09 is guilty of a misdemeanor of the third degree and shall be fined not more

than five hundred dollars ($500.00) or imprisoned not more than sixty days, or both, for each offense, and, in addition, shall thereafter be disqualified from acting in any official capacity in connection with the assessment or collection of taxes under this chapter.

CHAPTER 894
Admissions Tax

894.01 Definitions.
894.02 Amount of tax.
894.03 Admissions exempt from tax.
894.04 Collection od tax.
894.05 Certificate of registration; fee.
894.06 Certificate of registration for temporary or transitory amusement.
894.07 Rules and regulations.
894.08 Appeals.
894.09 Reports confidential.
894.10 Violations.
894.99 Penalty.

CROSS REFERENCES

Bingo - see GEN. OFF. 630.06 et seq.
Noise in places of entertainment - see GEN. OFF. 634.15
Safety of crowds at live entertainment performances - see GEN. OFF. 636.18
Private property used for public entertainment – see B.R. & T. Ch. 848

894.01 DEFINITIONS.

As used in this chapter:

(a) "Admission charge" means the charge made for the right or privilege to enter into a place. However, if such charge includes rental of property or services, it shall be deemed to be an admission charge if so designated, unless the charge is for rental or services and persons who do not use such property or services are admitted free. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge shall constitute the

admission charge. The designation of the charge as a rental or service charge shall not be construed to avoid the application of the tax if it is in effect a charge for admission.

(b) "Director" means the Director of Finance.

(c) "Person" means any individual, receiver, assignee, firm, copartnership, joint venture, corporation, company, joint-stock company, association, society or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit or otherwise.

(d) "Place" includes, but shall not be restricted to, theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, side shows, swimming pools, outdoor amusement parks, and such attractions as merry-go-rounds, Ferris wheels, dodge'ems, roller coasters and observation towers.

(Ord. 1947-54. Passed 11-6-47.)

894.02 AMOUNT OF TAX.

There is hereby levied and imposed upon every person who pays an admission charge to any place:

(a) A tax of three percent on the amounts paid for admission to any place, including admission by season ticket or subscription. The tax shall apply to every admission within the City for which a charge is made, notwithstanding that the sale of the ticket or other evidence of right of admission thereto is made outside of the City.

(b) A tax of three percent on the excess of the amounts paid for tickets or cards of admission to theaters, operas and other places of amusement, sold at newsstands, hotels and places other than the ticket office of such theaters, operas or other places of amusement, over and above the amounts representing the established price therefor at such ticket offices,

such tax to be returned and paid in the manner provided in Section 894.04 by the person selling the ticket.

(c) A tax of three percent on the amount paid for admission to any public performance for profit at any roof garden, cabaret or other similar entertainment in case the charge for admission is in the form of a service charge, cover charge or other similar charge.

(d) A tax of three percent on the amount paid as annual membership dues by every club or organization maintaining a golf course, and a tax of three percent on greens fees paid to golf courses, either under club or private ownership. (Ord. 1947-54. Passed 11-6-47.)

984.03 ADMISSIONS EXEMPT FROM TAX.

No tax shall be levied under this chapter with respect to any admission, all the proceeds of which inure:

(a) Exclusively to the benefit of religious, educational or charitable institutions, societies or organizations, societies or organizations for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any municipal corporation, or of maintaining a cooperative or community center moving picture theater or swimming pool, if no part of the net earnings thereof inures to the benefit of any private stockholder or individual.

(b) Exclusively to the benefit of persons in the military or naval forces of the United States, or of National Guard organizations, reserve officer associations or posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units or societies are

organized in the State and if no part of their net earnings inures to the benefit of any private stockholder or individual.

(c) Exclusively to the benefit of persons who have served in the military or naval forces of the United States and are in need.

(d) Exclusively to the benefit of members of the police or fire departments of any municipal corporation, or the dependents or heirs of such members.

(e) Exclusively to the benefit of the general revenue fund of any municipal corporation or exclusively to the benefit of any fund of any municipal corporation under the control of a recreation commission. This exemption from the tax, however, shall not be allowed in cases wherein the admission price is one dollar and one cent ($1.01) or more.

The exemption from tax providedby this section shall, however, not be allowed in case of admissions to wrestling matches, prize fights or boxing, sparring or other pugilistic matches or exhibitions, unless exclusively for the benefit of those organizations set forth in subsection (b) hereof, nor in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any high school, academy, preparatory or other school, in cases wherein the admission price is one dollar and one cent ($1.01) or more, or wholly or partly to the benefit of any college or university.

Immediately after the event for which an exemption from admission tax has been allowed, the treasurer of the institution, society or organization for whose benefit such event was held shall file an itemized statement with the Director setting forth the amount of money actually received by such treasurer, together with the expenses of promoting and conducting such event. Such statement shall be used as a basis of subsequent requests for exemption from admissions tax for the benefit of such institution, society or

organization and, if such statement shows a disproportionate expenditure for the promoting and conducting of such event, in relation to the profits, if any, no such exemption shall thereafter be allowed to such institution, society or organization.

The exemption from tax provided in this section shall not be allowed to any institution, society or organization which does not control the sale of admissions to the event for which the exemption is requested, nor shall any exemption be allowed where talent, services or other items are compensated for on a percentage basis if such percentage results in a payment in excess of the flat rate ordinarily charged for the same talent, services or other items.
(Ord. 1947-54. Passed 11-6-47.)

894.04 COLLECTION OF TAX.

Every person receiving any payment on which a tax is levied under this chapter shall collect the amount of the tax imposed from the person making the admission payment. The tax required to be collected under this chapter shall be deemed to be held in trust by the person required to collect the same until paid to the Director as herein provided.

Any person required to collect the tax imposed under this chapter who fails to collect the same or, having collected the same, fails to remit the same to the Director in the manner prescribed by this chapter, whether such failure be the result of his or her own act or the result of acts or conditions beyond his or her control, shall nevertheless be personally liable to the City for the amount of such tax, and shall, unless the remittance be made as herein required, be guilty of a violation of this chapter.

The tax imposed hereunder shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the Director in monthly installments and remittances therefor on or before the

thirtieth day of the month next succeeding the end of the monthly period in which the tax is collected or received. The first return and remittance under this chapter shall be made on or before November 30, 1947, and shall cover the period from and including October 1 to and including October 31 or a four or five-week policy month period as the case may be.

Payment or remittance of the tax collected may be made by check, unless payment or remittance is otherwise required by the Director, but payment by check shall not relieve the person collecting the tax from liability for payment and remittance of the tax to the Director unless the check is honored and is in the full aiid correct amount.

The person receiving any payment for admissions shall make out a return upon such forms setting forth such information as the Director may require, showing the amount of the tax upon admissions for which he or she is liable for the preceding monthly period, and shall sign and transmit the same to the Director with a remittance for such amount. The Director may, in his or her discretion, require verified annual returns from any person receiving admission payments setting forth such additional information as he or she may deem necessary to determine correctly the amount of tax collected and payable.

Whenever any theatre, circus, show, exhibition, entertainment or amusement makes an admission charge which is subject to the tax herein levied, and the same is of a temporary, or transitory nature, of which the Director shall be the judge, the Director may require the report and remittance of the admission tax immediately upon the collection of the same, at the conclusion of the performance or exhibition, or at the conclusion of the series of performances or exhibitions, or at such other times as the Director shall determine. Failure to comply with any requirement of the Director as to report and remittance of the tax as required shall be a violation of this chapter.

The books, records and accounts of any person collecting a tax herein levied shall, as to admission charges and tax collections, be at all reasonable times subject to examination and audit by the Director. If the tax imposed by this chapter is not paid when due there shall be added, as part of the tax, interest at the rate of one percent per month from the time when the tax became due until paid.
(Ord. 1947-54. Passed 11-6-47.)

894.05 CERTIFICATE OF REGISTRATION; FEE.

Any person conducting or operating any place for entrance to which an admission charge is made shall, on a form prescribed by the Director, make application to and procure from the Director a Certificate of Registration, the fee for which shall be one dollar ($1.00), which Certificate shall continue valid until December 31 of the year in which it is issued. Such Certificate of Registration, or duplicate original copies thereof to be issued by the Director without additional charge, shall be posted in a conspicuous place in each ticket or box office where tickets of admission are sold.
(Ord. 1947-54. Passed 11-6-47.)

894.06 CERTIFICATE OF REGISTRATION FOR TEMPORARY OR TRANSITORY AMUSEMENT.

W'henever a Certificate of Registration is obtained for the purpose of operating or conducting a temporary or transitory amusement, entertainment or exhibition by persons who are not the owners, lessees or custodians of the building, lots or place where the amusement is to be conducted, the tax imposed by this chapter shall be reported and remitted as provided in Section 894.04 by the owner, lessee or custodian, unless paid by the person conducting the place. The applicant for a Certificate of Registration for such purpose shall furnish with the application therefor the name and address of the owner, lessee or custodian of the premises upon which the amusement is to be conducted, and such owner, lessee or custodian shall be notified by the Director of

the issuance of such Certificate and the joint liability for collection and remittance of such tax. (Ord. 1947-54. Passed 11-6-47.)

894.07 RULES AND REGULATIONS.

The Director shall have power to adopt rules and regulations not inconsistent with the terms of this chapter for carrying out and enforcing the payment, collection and remittance of the tax herein levied. A copy of such rules and regulations shall be published in a newspaper having general circulation in the City at least once before they shall become effective, and copies shall be printed and made available in the office of the Director. Failure or refusal to comply with any such rules and regulations shall be deemed a violation of this chapter.

Until such time as rules and regulations are promulgated under this section, the rules and regulations of the Department of Taxation, State of Ohio, relating to admission taxes in effect on August 31, 1947, except as the same may conflict with the provisions of this chapter, shall be deemed to be the rules and regulations hereunder. (Ord. 1947-54. Passed 11-6-47.)

894.08 APPEALS.

Appeals from any ruling of the Director hereunder shall be made to Council, and Council shall have authority to annul, modify or affirm any such ruling appealed from, in conformity with the intent and purpose of this chapter. (Ord. 1947-54. Passed 11-6-47.)

894.09 REPORTS CONFIDENTIAL.

All returns and information relating to the business of any person required to collect the tax imposed by this chapter and coming into the possession of the Director, his or her agents and employees, shall be held confidential. No disclosures thereof shall be made. unless ordered by a court of competent jurisdiction, except, however, that the Director

may furnish the Bureau of Internal Revenue, Treasury Department of the United States, with copies of returns filed.
(Ord. 1947-54. Passed 11-6-47.)

894.10 VIOLATIONS.

No person charged with the duty of collecting or paying the taxes imposed by this chapter shall willfully fail or refuse to charge and collect or to pay such taxes, or to make return to the Director as required by this chapter, or to permit the Director or his or her duly authorized agent to examine his or her books and other records, in or upon any premises where the same are kept, to the extent necessary to verify any return made or to ascertain and assess the tax imposed by this chapter if no return was made, or to maintain and keep books, records and accounts for three years or such lesser or greater time as may be permitted or required by the Director.
(Ord. 1947-54. Passed 11-6-47.)

894.99 PENALTY.

(A) Whoever violates any of the provisions of this chapter, for which no penalty is otherwise provided, is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars ($500.00) or imprisoned not more than sixty days, or both, for each offense. A separate offense shall be deemed committed each day during or on which a violation occurs or continues.

(b) Whoever violates Section 894.09 shall, in addition to the penalty provided in subsection (a) hereof, be disqualified from acting in any official capacity whatsoever in connection with the assessment or collection of taxes under this chapter.

CHAPTER 701
Admissions Tax

701.01 Definitions.
701.02 Levy of tax.
701.03 Exemptions.
701.05 Certificates of registration Generally.
701.06 Certificates of registration for temporaru or transitory amusements.
701.07 Rules and regulations.
701.08 Appeals.
701.09 Disclosure of confidential reports.
701.10 Violations.
701.99 Penalty.

CROSS REFERENCES
Department of Finance - see ADM. Ch. 133
Earned income tax – see ADM. Ch. 161

701.01 DEFINITIONS.
As used in this chapter:

(a) "Admission charge," in addition to its usual and ordinary meaning, means and includes a charge made for season tickets or subscriptions; a cover charge, or a charge made for use of seats and tables, reserved or otherwise, and similar accommodations; a charge made for automobile parking where the amount of the charge is determined according to the number of passengers in an automobile; or a charge made for the

right or privilege to enter into a place. However, if such charge includes rental of property or services, it shall be deemed to be an admission charge if so designated, unless the charge is for rental or services, and persons who do not use such property or services are admitted free. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge shall constitute the admission charge. The designation of the charge as a rental or service charge shall not be construed to avoid the application of the tax if it is, in effect, a charge for admission.

(b) "Director of Finance" means the Director of Finance of the City and/or the authorized representative of the Director.

(c) "Place" means any enterprise permitted, conducted or operated by a person for which there is an admission charge. Examples of places are theaters, dance halls, night clubs, taverns, amphitheaters, museums, auditoriums, stadiums, skating rinks, bowling alleys, athletic pavilions and fields, parks, circuses, side shows, swimming facilities, outdoor amusement parks and rides and rides and observation towers.

(d) "Person" means any individual, receiver, assignee, firm, joint venture, corporation, company, joint stock company, association, society or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit or otherwise. (Ord. 1987-101. Passed 10-13-87.)

701.02 LEVY OF TAX.

For the purpose of providing additional revenue to the City for use in meeting general operating expenses, there is hereby levied and imposed upon every person who pays an admission charge to any place:

(a) A tax of three percent on the amounts paid for admission to any place, including admission by

season ticket or subscription, which tax shall apply to every admission within the City for which a charge is made, notwithstanding that the sale of the ticket or other evidence of right of admission thereto is made outside of the City;

(b) A tax of three percent on the excess of the amounts paid for tickets or cards of admission to theaters, operas and other places of amusement, sold at newsstands, hotels and places other than the ticket offices of such theaters, operas and other places of amusement, over and above the amounts representing the established price therefor at such ticket offices, such tax to be returned and paid in the manner provided in Section 701.04 by the person selling the ticket; and

(c) A tax of three percent on the amount paid for admission to any public performance for profit at any roof garden, night club, cabaret or other similar entertainment in case the charge for admission is in the form of a. service charge, cover charge or other similar charge.

(Ord. 1987-101. Passed 10-13-87.)

701.03 EXEMPTIONS.

(a) No tax shall be levied under this chapter with respect to any admission all the proceeds of which inure:

(1) Exclusively to the benefit of religious, educational or community service organizations, or charitable institutions, societies or organizations, if no part of the net earnings thereof inures to the benefit of any private stockholder or individual;

(2) Exclusively to the benefit of persons in the military or naval forces of the United States, National Guard organizations, reserve officer organizations, posts or organizations of war veterans or auxiliary units or societies of any

such posts or organizations, if such posts, organizations, units or societies are organized in the State and if no part of their net earnings inures to the benefit of any private stockholder or individual;

(3) Exclusively to the benefit of persons who have served in the military or naval forces of the United States and are in need;

(4) Exclusively to the benefit of members of any department fund of any municipal corporation or the dependents or heirs of such members;

(5) Exclusively to the benefit of the general revenue fund of any municipal corporation or exclusively to the benefit of any fund of any municipal corporation under the control of a recreation commission; or

(6) Exclusively for annual membership dues for a health or fitness club.

(b) Immediately after the event for which an exemption from the admission tax has been allowed, the treasurer of the institution, society or organization for whose benefit such event was held shall file an itemized statement with the Director of Finance setting forth the amount of money actually received by such treasurer together with the expenses of promoting and conducting such event. Such statement shall be used as a basis of subsequent requests for exemption from the admission tax for the benefit of such institution, society or organization and if such statement shows a disproportionate expenditure for promoting and conducting such event in relation to the profits, if any, no such exemption shall thereafter be allowed to such institution, society or organization.

(c) The exemption from the tax provided in this section shall not be allowed to any institution, society or organization that does not control the sale of admissions to

the event for which the exemption is requested, nor shall any exemption be allowed where talent, services or other items are compensated for on a percentage basis if such percentage results in a payment in excess of the flat rate ordinarily charged for the same talent, services or other items. (Ord. 1987-101. Passed 10-13-87.)

701.04 COLLECTION OF TAX.

Every person receiving any payment on which a tax is levied under this chapter shall collect the amount of the tax imposed from the person making the admission payment. The tax required to be collected under this chapter shall be deemed to be held in trust by the person required to collect the same until paid to the Director of Finance as herein provided. No person required to collect the tax imposed under this chapter shall fail to collect the same or, having collected the same, fail to remit the same to the Director in the manner prescribed by this chapter, whether such failure is the result of his own act or the result of acts or conditions beyond his control. In the case of such failure the person shall nevertheless be personally liable to the City for the amount of such tax, in addition to the penalty. provided in Section 701.99. The tax imposed hereunder shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the Director in monthly installments and remittances therefor on or before the thirtieth day of the month next succeeding the end of the monthly period in which the tax is collected or received. Payment or remittance of the tax collected may be made by check, unless payment or remittance is otherwise required by the Director, but payment by check shall not relieve the person collecting the tax from liability for payment and remitance of the tax the Director unless the check is honored and is in the full and correct amount. The person receiving any payment for admissions shall make out a return upon

such forms and setting forth such information as the Director may require, showing the amount of the tax upon admissions for which he is liable for the preceding monthly period, and shall sign and transmit the same to the Director with a remittance for such amount, provided that the Director has the discretion to require verified annual returns from any person receiving admission payments setting forth such additional information as is deemed necessary to determine correctly the amount of tax collected and payable. Whenever any theater, circus, show, exhibition, entertainment or amusement makes an admission charge which is subject to the tax herein levied, and the same is of a temporary or transitory nature, of which the Director shall be the judge, the Director may require the report and remittance of the admission tax immediately upon its collection, at the conclusion of the perrformance or exhibition, at the conclusion of the series of performances or exhibitions or at such other times as the Director determines. No person shall fail to comply with any requirement of the Director as to report and remittane of the tax as required. The books, records and accounts of any person collecting the tax herein levied shall, as toadmission charges and tax collections, be at all reasonable times subject to examination and audit by the Director. If the tax imposed by this chapter is not paid when it is due there shall be added, as part of the tax, interest at the rate of five percent per month from the time the tax became due until paid. (Ord. 1976-23. Passed 2-24-76.)

701.05 CERTIFICATES OF REGISTRATION GENERALLY.

Any person conducting or operating any place for entrance to which an admission charge is made shall, on a form prescribed by the Director of Finance, make application to and procure from the Director a certificate of registration, the fee for which shall be five dollars ($5.00), which certificate shall continue valid until December 31 of the year

which the same is issued. Such certificate of registration or duplicate original copies thereof, to be issued by the Director without additional charge, shall be posted in a conspicuous place in each ticket or box office where tickets of admission are sold. (Ord. 1976-23. Passed. 2-24-76.)

701.06 CERTIFICATES OF REGISTRATION FOR TEMPORARY OR TRANSITORY AMUSEMENTS.

Whenever a certificate of registration is obtained for the purpose of operating or conducting a temporary place or transitory amusement, entertainment or exhibition by a person who is not the owner, lessee or custodian of the building, lot or place where amusement is to be conducted, the tax imposed by this chapter shall be reported and rem,itted as provided in Section 701.04 by such owner, lessee or custodian, unless paid by the psrson conduction the place. The applicant for a certificate of registration for such purpose shall furnish with the application therefor the name and address of the owner, lessee or custodian of the premises upon which the amusement is to be conducted, and such owner, lessee or custodian shall be notified by the Director of Finance of the issuance of such certificate and the joint liability for collection and remittance of such tax. (Ord. 1976-23. Passed 2-24-76.)

701.07 RULES AND REGULATIONS.

The Director of Finance is hereby authorized to adopt rules and regulations not inconsistent with the provisions of this chapter for carrying out and enforcing the payment, collection and remittance of the tax herein levied. A copy of such rules and regulations shall be published as ordinances of the City are published before they shall become effective and copies shall be printed and made available in the office of the Director. No person shall fail or refuse to comply with any such rule or regulation. (Ord. 1976-22. Passed 2-24-76.)

701.08 APPEALS.

Appeals from any ruling of the Director of Finance under the provisions of this chapter shall be made to Council within ten days after such ruling and Council shall have authority to annul, modify or affirm any such ruling appeals from, in conformity with the intent and purpose of this chapter. (Ord. 1976-23. Passed 2-21-76.)

701.09 DISCLOSURE OF CONFIDENTIAL REPORTS.

All returns and information relatjmg to the business of any person required to collect the tax imposed by this chapter and coming into the possession of the Director of Finance or other acent or employee of the City, shall be held confidential. No person shall make any disclosure thereof unless ordered by a court of competent jurisdiction, except that the Director may furnish the Bureau of Internal Revenue, Treasury Department of the United States, with copies of returns filed.

This section shall not prohibit the Director from providing Council with the names of persons or businesses who or which have filed a return under this chapter for any particular year when requested to do so by Council. (Ord. 1986-144. Passed 12-23-86.)

701.10 VIOLATIONS.

No person charged by this chapter with the duty of collecting or paying the taxes imposed by this chapter shall purposely fail or refuse to charge and collect or pay such taxes, or purposely fail to make a return to the Director of Finance as required by this chapter, or purposely fail to permit the Director to examine books and other records in or upon any premises where the same are kept, to the extent necessary to verify any return made or to ascertain and assess the tax imposed by this chapter if no return was made, or purposely fail to maintain and keep for three years, or such

lesser or greater time as may be permitted or required by the Director, such records, ticket stubs and other documents pertaining to the sale or other disposition of admissions, as may be required by the Director. (Ord. 1976-23. Passed 2-24-76.)

701.99 PENALTY.

(a) Whoever violates any of the provisions of this chapter for which no penalty is otherwise provided shall be fined not more than five hundred dollars ($500.00).

(b) Whoever violates Section 701.09 shall be fined not more than one hundred dollars ($100.00). (Ord. 1976-23. Passed 2-24-76.)

TITLE NINE – Taxation

Chap. 191. Admissions Tax.
Chap. 193. Earned Income Tax.
Chap. 195. Excise Tax on Hotel Accomodations.
Chap. 197. Motor Vehicle License Tax

Chapter 191
Admissions Tax

191.01 Definitions
191.02 Amounts to be levied.
191.03 Admissions exempt from tax.
191.04 Tax collection and Remittance.
191.05 Certificate of Registration; fee, term and posting.
191.06 Temporary amusement; Certificate amnd joint liability.
191.07 Rules and regulations.
191.99 Penalty.

CROSS REFERENCES

Power to levy - see CHTR. Art. VI, Sec.3
Department of Finance - see ADM. Ch. 135
Earned income tax – see ADM. Ch. 193

191.01 DEFINITIONS.

For the purposes of this chapter, the following words and phrases shall have the following meanings:

(a) "Admission charge," in addition to its usual and ordinary meaning, includes a charge made for season tickets or subscriptions, a cover charge or a charge made for the use of seats

and tables, reserved or otherwise, and similar accommodations; a charge made for food and refreshments in any place where any free entertainment, recreation or amusement is provided; a charge made for rental or use of equipment or facilities for purposes of recreation or amusement, and where the rental of equipment or facilities is necessary to the enjoyment of the privileges for which a general admission is charged; and a charge made for parking where the amount of the charge is determined according to the number of passengers in a vehicle.

(b) "Director of Finance'' means the Director of Finance of the City.

(c) "Place" includes, but is not restricted to, theaters, dance halls, amphitheatres, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks and such attractions as merry-go-rounds, ferris wheels, dodgeems, roller coasters and observation towers.

(d) "Person" means any individual, receiver, assignee, firm, copartnership, joint venture, corporation, company, joint stock company, association, society or group of individuals acting as a unit, whether mutual, co-operative, fraternal, nonprofit or otherwise.

(Ord. 3516. Passed 9-4-47.)

191.02 AMOUNTS TO BE LEVIED.

There is hereby levied and imposed upon every person who pays an admissioia charge to any place, including a tax on persons who are admitted free of charge, or at reduced rates, to any place for which other persons pay a

charge or a regular higher charge for the same or similar privileges or accommodations:

(a) A tax of three percent on the amount paid for admission to any place, including admission by season ticket or subscription.

(b) A tax of three percent on the excess of the amounts received for tickets or cards of admission to theatres, operas and other places of amusement, sold at newsstands, hotels and places, other than the ticket offices of theatres, operas or other places of amusement, over and above the amount representing the established price therefor at such ticket offices. Such tax shall be returned and paid in the manner provided in Section 191.04 by the person selling the ticket.

(c) A tax of three percent on the amount received for admission to any public performance for profit at any roof garden, cabaret or other similar entertainment in case the charge for admission is in the form of a service charge or cover charge or other similar charge.

(d) A tax of three percent on the amount received as annual membership dues by every club or organization maintaining a golf course; and a tax of three percent on green fees collected by golf courses either under club or private ownership.

(Ord. 3516. Passed 9-4-47.)

191.03 ADMISSIONS EXEMPT FROM TAX.

No tax shall be levied under this chapter with respect to any admission, all the proceeds of which inure:

(a) Exclusively to the benefit of religious, educational or charitable institutions, societies or organizations, if no part of the net earnings

thereof inure to the benefit of any private stockholder or individual.

(b) Exclusively to the benefit of persons in the military or naval forces of the United States, or of National Guard organizations, reserve officer associations or posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units or societies are organized in the State, and if no part of their net earnings inure to the benefit of any private stockholder or individual.

(c) Exclusively to the benefit of persons who serve in the armed forces of the United States and are in need.

(d) Exclusively to the benefit of members of the police or fire departments of any municipal corporation, or the dependents or heirs of such members.

(e) Exclusively to the benefit of the general revenue fund of any the City or exclusively to the benefit of any fund of the City under the control of the Recreation Board.

(f) Exclusively to the benefit of the Board of Education of the City or any public or parochial school or department thereof.

However, the exemption from the tax as provided by this section shall not be allowed in case of admissions to wrestling matches, prize fights, boxing, sparring or other pugilistic matches or exhibitions, nor to any institution, society or organization which does not control the sale of the admissions to the event for which exemption is claimed, nor shall any exemption be allowed when talent, services or other items are compensated for on

a percentage basis, if such percentage basis results in a payment in excess of the flat rate ordinarily charged for the same talent, services or other items.
(Ord. 1956-72. Passed 4-19-56.)

191.04 TAX COLLECTION AND REMITTANCE; LIABILITY AND DELINQUINCY.

Any person receiving any payment on which a tax is levied under this chapter shall collect the amount of the tax imposed from the person making the admission payment. The tax required to be collected under this chapter shall be deemed to be held in trust by the person required to collect it until paid to the Director of Finance as herein provided. Any person required to collect the tax imposed by this chapter who fails to collect the same, or having collected the same, fails to remit the same to the Director in the manner prescribed by this chapter, whether such failure be the result of his own act or acts or conditions beyond his control, shall nevertheless be personally liable to the City for the amount of such tax and shall, unless the remittance is made as herein required, be guilty of a violation of this chapter.

The tax imposed under this chapter shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the Director of Finance in semiannual installments and remittances therefor on or before January 10 and July 10 of each calendar year hereafter, in each case for the six-month prior period in which the tax is collected or received. Payment or remittance of the tax collected may be made by check, unless otherwise required by the Director of Finance. Payment by check shall not relieve the person collecting the tax from liability for payment and remittance of the tax to the Director of Finance unless the check is honored and is in the full and correct amount.

The person receiving any payment for admissions shall make out a return upon such forms and shall set forth such information as the Director of Finance may require, showing the amount of the tax upon admissions for which he is liable for the preceding semiannual or other tax period, and shall sign and transmit the same to the Director of Finance with a remittance for the amount. The Director of Finance may in his discretion require verified annual returns from any person receiving admission payments, setting forth such additional information as he may deem necessary to correctly determine the .amount of tax collected and payable.

Whenever any theatre, circus, show, exhibition, entertainment or amusement makes an admission charge which is subject to the tax herein levied, and the same is of a temporary or transitory nature, of which the Director of Finance shall be the judge, the Director may require the report and remittance of the admission tax immediately upon the collection of the same, at the conclusion of the performance or exhibition, at the conclusion of the series of performances or exhibitions, or at such other times as the Director shall determine. Failure to comply with any requirement of the Director of Finance as to report and remittance of the tax as required shall be a violation of this chapter.

The books, records and accounts of any person collecting a tax herein levied shall, as to admission charges and tax collections, be, at all reasonable times subject to examination and audit by the Director of Finance.

If the tax imposed by this chapter is not paid when due, there shall be added as part of the tax, interest at the rate of one percent per month from the time when the tax became due until the same is paid.

(Ord. 1956-72. Passed 4-19-56.)

191.05 CERTIFICATE OF REGISITRATION; FEE, TERM AND POSTNG.

Any person conducting or operating any place for entrance to which an admission charge is made shall, on a form prescribed by the Director of Finance, make application to and procure from the Director a Certificate of Registration. The fee for such Certificate shall be one dollar ($1.00), and the Certificate shall continue valid until December 31 of the year in which issued. The Certificate of Registration, or duplicate copies thereof to be issued by the Director of Finance without additional charge, shall be posted in a conspicuous place in each ticket or box office where tickets of admission are sold.
(Ord. 3516. Passed 9-4-47.)

191.06 TEMPORARY AMUSEMENT; CERTIFICATE AND JOINT LIABILITY.

Whenever a Certificate of Registration is obtained for the purpose of operating or conducting a temporary or transitory amusement, entertainment or exhibition by persons who are not the owners, lessees or custodians of the building, lots or place where the amusement is to be conducted, the tax imposed by this chapter shall be reported and remitted as provided in Section 191.04 by the owner, lessee or custodian, unless paid by the person conducting the place. The applicant for a Certificate of Registration for such purpose shall furnish with the application the name and address of the owner, lessee or custodian of the premises upon which the amusement is to be conducted. Such owner, lessee or custodian shall be notified by the Director of Finance of the issuance of the Certificate and the joint liability for collection and remittance of the tax.
(Ord. 3516. Passed 9-4-47.)

191.07 RULES AND REGULATIONS.

The Director of Finance shall have the power to adopt rules and regulations not inconsistent with the terms of this chapter for carrying out and enforcing the payment, collection and remittance of the tax herein levied. A copy of the rules and regulations shall be published by posting them for fifteen days in the places designated by Section 123.01(b) before they shall become effective. Copies shall be made available in the office of the Director of Finance. Failure or refusal to comply with any such rules and regulations shall be deemed a violation of this chapter.

Until such time as rules and regulations are promulgated under this section, the rules and regulations of the Department of Taxation, State of Ohio, relating to admission taxes in effect on August 31, 1947, except as the same may conflict with the provisions of this chapter, shall be deemed to be the rules and regulations hereunder.
(Ord. 3516. Passed 9-4-47.)

191.99 PENALTY.

Whoever, being a person charged by this chapter with the duty of collecting or paying the taxes imposed by this chapter, willfully fails or refuses to charge and collect or pay such taxes, or to make return to the Director of Finance as required by this chapter, or to permit the Director or his duly authorized agent to examine his books and other records in or upon any premises where the same are kept to the extent necessary to verify any return made, or to ascertain and assess the tax imposed by this chapter if no return was made, or to maintain and keep his books and records for three years or such other time as may be required by the Ditrector of Finance, shall be guilty of a minor misdemeanor.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY OHIO

REGAL CINEMAS, INC.	)	**CASE NO. 354624**
	)	
Plaintiff,	)	
	)	
	)	**JUDGE STUART A**
	)	**FRIEDMAN**
	)	
CITY OF MAYFIELD	)	
HEIGHTS, et al.,	)	**STIPULATION OF**
	)	**FACTS**
Defendants.	)	

Now come the parties hereto pursuant to Rule 16 of the Ohio Rules of Civil Procedure and Stipulate the following facts:

1. Defendant City of Mayfield Heights is, and at all times relevant hereto was, a municipal corporation which is duly organized pursuant to the laws of the State of Ohio and is situated in the County of Cuyahoga.

2. Defendants Margaret Egensperger and Robert G. Tribby are the Mayor and Finance Director, respectively, of the City of Mayfield Heights.

3. In 1953, the City of Mayfield Heights enacted an ordinance imposing an admission tax. The current amount of the admissions tax is five percent of the admission fee. As stated in section 791.02 of the Mayfield Heights Municipal Code, the tax is levied "upon every person who pays an admissions charge to any place." Section 791.01 states, in pertinent part, that the term "place" includes, but is not restricted to, "theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, golf courses, golf driving ranges, bowling alleys, ice-skating

rinks, roller-skating rinks, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks and such attractions as merry-go-rounds, Ferris wheels, dodge'ems, roller coasters and observation towers."

4. Section 791.04 of the Mayfield Heights Municipal Code states that the Mayfield Heights admission tax "shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the [city Finance] Director in monthly installments and remittances on or before the tenth day of the month succeeding the end of the monthly period in which the tax is collected or received." That same section states that, "Any person required to collect the tax . . . who fails to collect it, or, having collected it, fails to remit it to the Director . . . shall nevertheless be personally liable to the City for the amount of the tax and shall, unless the remittance is made . . . be guilty of a violation of this chapter." Sec. 791.04.

5. A true, accurate, and genuine copy of the Mayfield Heights admission tax ordinance, Chapter 791 of the municipal code, is attached hereto as Exhibit 1.

6. Defendant City of Solon is, and at all times relevant hereto was, a municipal corporation which is duly organized pursuant to the laws of the State of Ohio and is situated in the County of Cuyahoga.

7. Defendants Kevin C. Patton and Dennis Anderson are the Mayor and Finance Director, respectively, of the City of Solon.

8. In 1947, the City of Solon enacted an ordinance imposing an admission tax in the amount of three percent of the admission fee which tax, as stated in section 894.02 of the Solon Municipal Code, is levied "upon every person who pays an admissions charge to any place." Section 894.01 states, in pertinent part, that the term "place"

includes, but is not restricted to, "theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, side shows, swimming pools, outdoor amusement parks, and such attractions as merry-go-rounds, Ferris wheels, dodge'ems, roller coasters and observation towers."

9. Section 894.04 of the Solon Municipal Code states that the Solon admission tax "shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the [city Finance] Director in monthly installments and remittances therefor on or before the thirtieth day of the month next succeeding the end of the monthly period in which the tax is collected or received." That same section states that, "Any person required to collect the tax . . . who fails to collect the same or . . . fails to remit the same to the Director . . . shall . . . be personally liable to the City for the amount of such tax." Sec. 894.04.

10. A true, accurate, and genuine copy of the Solon admission tax ordinance, Chapter 894 of the municipal code, is attached hereto as Exhibit 2.

11. Defendant City of Middleburg Heights is, and at all times relevant hereto was, a municipal corporation which is duly organized pursuant to the laws of the State of Ohio and is situated in the County of Cuyahoga.

12. Defendants Gary W. Starr and Tim Pope are the Mayor and Finance Director, respectively, of the City of Middleburg Heights.

13. In 1949, the City of Middleburg Heights enacted an admission tax in the amount of three percent of the admission fee which tax, as stated in section 701.02 of the Middleburg Heights Municipal Code, is levied "upon every person who pays an admissions charge to any place." Section 701.01 states, in pertinent part, that the term "place"

includes, but is not restricted to, "theaters, dance halls, night clubs, taverns, amphitheaters, museums, auditoriums, stadiums, skating rinks, bowling alleys, athletic pavilions and fields, parks, circuses, side shows, swimming facilities, outdoor amusement parks and rides and rides [sic] and observation towers." See. 701.01.

14. Section 701.04 of the Middleburg Heights Municipal Code states that the Middleburg Heights admission tax "shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the [city Finance] Director in monthly installments and remittances therefor on or before the thirtieth day of the month next succeeding the end of the monthly period in which the tax is collected or received." That same section states that, "No person required to collect the tax imposed under this chapter shall fail to collect the same or having collected the same, fail to remit the same to the director . . . . In the case of such failure the person shall nevertheless be personally liable to the City for the amount of the tax . . . ." Sec. 701.04.

15. A true, accurate, and genuine copy of the Middleburg Heights admission tax ordinance, Chapter 701 of the municipal code, is attached hereto as Exhibit 3.

16. Defendant City of Westlake is, and at all times relevant hereto was, a municipal corporation which is duly organized pursuant to the laws of the State of Ohio and is situated in the County of Cuyahoga.

17. Defendants Dennis Clough and William Fritzsche are the Mayor and Finance Director, respectively, of the City of Westlake.

18. In 1947, the City of Westlake enacted an admission tax in the amount of three percent of the admission fee which tax, as stated in section 191.02 of the

Westlake Municipal Code, is levied "upon every person who pays an admissions charge to any place." Section 191.01 states, in pertinent part, that the term "place" includes, but is not restricted to, "theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks and such attractions as merry-go-rounds, ferris wheels, dodgems, roller coasters and observation towers."

19. Section 191.04 of the Westlake Municipal Code states that the Westlake admission tax "shall be collected at the time the admission charge is paid by the person seeking admission to any place and shall be reported and remitted by the person receiving the tax to the [city] Director of Finance in semiannual installments and remittances therefor on or before January 10 and July 10 of each calendar year hereafter, in each case for the six-month prior period in which the tax is collected or received." That same section states that, "Any person required to collect the tax imposed by this chapter who fails to collect the same, or having collected the same, fails to remit the same to the Director . . . . shall nevertheless be personally liable to the City for the amount of such tax . . . ." Sec. 191.04.

20. A true, accurate, and genuine copy of the Westlake admission tax ordinance, Chapter 191 of the municipal code, is attached hereto as Exhibit 4.

21. The Defendant municipalities received admissions taxes in the years, in the amounts and from the sources set forth in Exhibit 5 attached hereto.

22. Beginning in 1996, Plaintiff Regal Cinemas, Inc., became the owner and operator of the movie theater, "Mayfield Heights Cinema 10," in the City of Mayfield Heights. The theater opened its doors for business on September 20, 1996. The theater has ten screens with a total

seating capacity of total approved occupancy of 1,849. The average number of patrons admitted to the theater each month is 36,538 based on monthly returns filed with the City.

23. Beginning in 1991, Plaintiff Regal Cinemas Inc., became the owner and operator of the movie theater, "Solon Commons Cinema 16," in the City of Solon. The theater opened its doors for business on September 20, 1991. The theater has sixteen screens with a total seating capacity of 3,340. The average number of patrons admitted to the theater each month is 48,841.

24. Beginning in 1996, Plaintiff Regal Cinemas, Inc., became the owner and operator of the movie theater, "Middleburg Town Square Cinema 12," in the City of Middleburg Heights. The theater opened its doors for business on November 15, 1996. The theater has twelve screens with a total seating capacity of 2,287. The average number of patrons admitted to the theater each month is 43,431.

25. Beginning in 1994, Plaintiff Regal Cinemas, Inc., became the owner and operator of the movie theater, "Westlake Promenade Cinema 11" in the City of Westlake. The theater opened its doors for business on August 31, 1994. The theater has eleven screens with a total seating capacity of 2,174. The average number of patrons admitted to the theater each month is 40,124.

26. The total price paid by patrons of the four Regal Cinemas, Inc. theaters which are the subject of this litigation varies between $4.50 and $6.75 per ticket, depending on the time of day and type of customer.

27. Attached as Exhibits 6, 7, 8, and 9 are true and correct copies of tickets used by Plaintiff Regal Cinemas, Inc., for adult and child admissions at their theaters in the

Cities of Mayfield Heights, Solon, Middleburg Heights, and Westlake, respectively.

28. At each of the four Regal Cinemas, Inc. theaters which are the subject of this litigation, the admission ticket is delivered to the patron at the time the patron pays the admission price of the theater. Upon admission into the theater, the ticket is divided in half by a member of the theater staff. Half of the ticket is retained by the theater employee, while the other half is returned to the patron.

29. The admission tickets distributed by each of the four Regal Cinemas, Inc. theaters which are the subject of this litigation do not currently indicate in any manner the existence, payment, or collection of the admission tax.

30. Neither the box offices nor any other location within any of the four Regal Cinemas, Inc. theaters which are the subject of this litigation indicate or refer to the existence, payment, or collection of the admission tax

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

REGAL CINEMAS, INC.,	)	
a Tennessee Corporation	)	
7132 Commercial Park Drive	)	
JUDGE STUART A. FRIEDMAN	)	
Knoxville, TN 37918,	)	
	)	
Plaintiff,	)	
	)	**Case No.**
v.	)	**354624**
	)	
CITY OF MAYFIELD HEIGHTS, a	)	
municipal corporation organized under the	)	
laws of the State of Ohio	)	
6154 Mayfield Road	)	
Mayfield Heights, OH 44124,	)	
	)	
Margaret Egensperger, an individual, solely	)	
in her capacity as the MAYOR of the	)	
CITY OF MAYFIELD HEIGHTS	)	
6154 Mayfield Road	)	
Mayfield Heights, OH 44124,	)	
	)	
Robert G. Tribby, an individual, solely in his	)	
capacity as the CITY FINANCE DIRECTOR	)	
of the CITY OF MAYFIELD HEIGHTS	)	
6154 Mayfield Road	)	
Mayfield Heights, OH 44124,	)	
	)	
CITY OF SOLON, a municipal corporation	)	
organized under the laws of the State of Ohio)		
City Hall	)	
34200 Bainbridge Road	)	
Solon, OH 44139,	)	
	)	
Kevin C. Patton, an individual, solely in his	)	
capacity as the MAYOR of the	)	

CITY OF SOLON
City Hall
34200 Bainbridge Road
Solon, OH 44139,

Dennis Anderson, an individual, solely in his capacity as the CITY FINANCE DIRECTOR of the CITY OF SOLON
City Hall
34200 Bainbridge Road
Solon, OH 44139,

and

DOES I through XX, individuals and other entities,

Defendants,

AND

CITY OF MIDDLEBURG HEIGHTS, a municipal corporation organized under the laws of the State of Ohio
15700 E. Bagley Road
Middleburg Heights, OH 44130,

Gary W. Starr, an individual, solely in his capacity as the MAYOR of the CITY OF MIDDLEBURG HEIGHTS
15700 E. Bagley Road
Middleburg Heights, OH 44130,

Tim Pope, an individual, solely in his capacity as the CITY FINANCE DIRECTOR of the CITY OF MIDDLEBURG HEIGHTS
15700 E. Bagley Road
Middleburg Heights, OH 44130,
CITY OF WESTLAKE, a municipal

corporation organized under the laws of the State of Ohio
27216 Hilliard Boulevard
Westlake, OH 44145,

Dennis Clough, an individual, solely in his capacity as the MAYOR of the CITY OF WESTLAKE
27216 Hilliard Boulevard
Westlake, Ohio 44145,

William Fritzsche, an individual, solely in his capacity as the CITY FINANCE DIRECTOR of the CITY OF WESTLAKE
27216 Hilliard Boulevard
Westlake, OH 44145,

New Party Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, REGAL CINEMAS, INC., by and through its undersigned counsel, presents this Amended Complaint in which Plaintiff raises claims against two new city defendants and their respective Mayors and Finance Directors in addition to the two city defendants and their respective Mayors and Finance Directors against whom Plaintiff filed their original Complaint. In complaint of all defendants, Plaintiff alleges as follows:

Parties

1. Plaintiff Regal Cinemas, Inc. ("Regal"), is, and at all times relevant hereto was, a corporation which owns and operates movie theaters throughout the United

States, including Ohio. In the City of Solon, Regal owns and operates the "Solon Commons Cinema 16." In the City of Mayfield Heights, Regal owns and operates the "Mayfield Heights Cinema 10." In the City of Middleburg Heights, Regal owns and operates the "Middleburg Town Square Cinema 12." In the City of Westlake, Regal owns and operates the "Westlake Promenade Cinema 11."

2. Defendant City of Mayfield Heights is, and at all times relevant hereto was, a municipal corporation duly organized pursuant to the provisions of Ohio Rev. Code Sec. 703.01 under the laws of the State of Ohio and situated in the County of Cuyahoga.

3. Defendants Margaret Egensperger and Robert G. Tribby are the Mayor and Finance Director, respectively, of the City of Mayfield Heights. They are sued solely in their official capacities, whose duties include the collection and administration of municipal taxes.

4. Defendant City of Solon is, and at all times relevant hereto was, a municipal corporation duly organized pursuant to the provisions of Ohio Rev. Code Sec. 703.01 under the laws of the State of Ohio and situated in the County of Cuyahoga.

5. Defendants Kevin C. Patton and Dennis Anderson are the Mayor and Finance Director, respectively, of the City of Solon. They are sued solely in their official capacities, whose duties include the collection and administration of municipal taxes.

6. Defendant City of Middleburg Heights is, and at all times relevant hereto was, a municipal corporation duly organized pursuant to the provisions of Ohio Rev. Code Sec. 703.01 under the laws of the State of Ohio and situated in the County of Cuyahoga.

7. Defendants Gary W. Starr and Tim Pope are the Mayor and Finance Director, respectively, of the City of Middleburg Heights. They are sued solely in their official capacities, whose duties include the collection and administration of municipal taxes.

8. Defendant City of Westlake is, and at all times relevant hereto was, a municipal corporation duly organized pursuant to the provisions of Ohio Rev. Code Sec. 703.01 under the laws of the State of Ohio and situated in the County of Cuyahoga.

9. Defendants Dennis Clough and William Fritzsche are the Mayor and Financial Director, respectively, of the City of Westlake. They are sued solely in their official capacities, whose duties include the collection and administration of municipal taxes.

10. Defendants DOES I-XX are individuals and other entities who and which are employees, agents, or components of the government of the city-defendants and who and which are involved in the collection of the municipal taxes. The duties and identities of DOES I-XX are presently unknown to Plaintiff, who will amend this Complaint to identify them when they become known.

Nature of Action, Jurisdiction and Venue

11. This is an action seeking declaratory and injunctive relief with respect to the admissions taxes now in effect in each Defendant City.

12. This Court has jurisdiction to declare this ordinance unconstitutional as applied to Plaintiff and its patrons, pursuant to Chapters 2721 and 2723 of the Ohio Revised Code.

13. This Court has jurisdiction to grant the injunctive relief sought. Ohio Rev. Code Sec. 2305.01 and 2723.01.

14. Venue in this Court is proper. Ohio R. Civ. P. 3(B).

Facts

15. As set forth below, each Defendant City imposes an admissions tax on the amount paid for admission to any place or event, with certain specified exceptions, at rates varying between three and five percent. In each city, the taxing ordinance is broadly worded to apply to all types of events. In each case, however, the burden of the tax is in reality borne almost exclusively by the Plaintiff and its patrons.

16. Each ordinance nominally imposes the tax on the patron attending the event. In each case, however, liability for actual payment of the tax, regardless whether actually collected from the patron, is imposed upon the "owner, lessee, or operator" who charges a fee for admission. Penalties or interest or both are imposed in the case of a vendor such as Regal's failure to pay the tax or to file the necessary return when due.

17. Activities of movie theaters are protected by the First Amendment to the United States Constitution and by Article I, Section 11 of the Constitution of the State of Ohio.

18. Although the provisions imposing the taxes are broadly worded, in reality, the taxes are borne almost exclusively by Plaintiff's movie theaters, which are engaged in protected free speech activities. Plaintiff's movie theaters pay approximately 90% or more of the admissions tax collected by each City. Thus, these taxes are imposed almost exclusively upon activities which enjoy protection under the

First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

19. In the City of Mayfield Heights, Chapter 791 of Title Three of the City of Mayfield Heights Revised Code, a copy of which is attached to this amended complaint as Exhibit 1, levies a five-percent (5%) tax upon the amount paid for admission to any place, including theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, golf courses, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks, merry-go-rounds, ferris wheels, dodge'ems, or roller coasters. The tax must be paid by the 10th day of the following month. Sec. 791.04. If the person charging admission fails to collect the admissions tax, it is personally liable to the city for the payment of the amount due, and shall be guilty of a violation of the admissions tax. Sec. 791.04. A violation of the admissions tax constitutes a minor misdemeanor. Sec. 791.99. With respect to the calendar years 1996 and 1997, Plaintiff paid the amounts of $25,546.57 and $121,096.56, respectively. Upon information and belief, Plaintiff is the primary taxpayer, and bears over 90% of the entire burden of the Mayfield Heights admissions tax.

20. In the City of Solon, Chapter 894 of Title Four of the City of Solon Revised Code, a copy of which is attached to this amended complaint as Exhibit 2, levies a three-percent (3%) tax upon the amount paid for admission to any place, including theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, sideshows, swimming pools, outdoor amusement parks, merry-go-rounds, ferris wheels, dodge'ems, or roller coasters. The tax must be paid by the 30th day of the following month. Sec. 894.04. If the person charging admission fails to collect the admissions tax, it is personally liable to the city for the payment of the amount

due, and shall be guilty of a violation of the admissions tax. Sec. 894.04. A violation of the admissions tax constitutes a misdemeanor of the third degree. With respect to the calendar years 1991 through 1997, Plaintiff paid the amounts of $9,455.04, $43,166.42, $57,076.05, $58,351.75, $74,796.76, $73,317.01, and $90,110.62, respectively. Upon information and belief, Plaintiff is the principal taxpayer, and bears over 97% of the entire burden of the Solon admissions tax.

21. In the City of Middleburg Heights, Chapter 701 of Part Seven of the City of Middleburg Heights Business Regulation Code, a copy of which is attached to this amended complaint as Exhibit 3, levies a three-percent (3%) tax upon the amount paid for admission to any place, including theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, circuses, sideshows, swimming pools, outdoor amusement parks and rides. The tax must be paid by the 30th day of the following month. Sec. 701.04. If the person charging admission fails to collect the admissions tax, it is personally liable to the city for the payment of the amount due, and shall be guilty of a violation of the admissions tax. Sec. 701.04. A violation of the admissions tax results in a fine under Section 701.99. With respect to the calendar years 1996 and 1997, Plaintiff paid the amounts of $10,282.10 and $85,376.51, respectively. Upon information and belief, Plaintiff is the only regular taxpayer, and thus bears over 99% of the entire burden of the Middleburg Heights admissions tax.

22. In the City of Westlake, Chapter 191 of Title Nine of the City of Westlake Revised Code, a copy of which is attached to this amended complaint as Exhibit 4, levies a three-percent (3%) tax upon the amount paid for admission to any place, including theaters, dance halls, amphitheaters, auditoriums, stadiums, athletic pavilions and fields, baseball and athletic parks, circuses, sideshows, swimming pools,

outdoor amusement parks, merry-go-rounds, ferris wheels, dodge'ems, or roller coasters. Although the ordinance nominally requires that the tax be paid semi-annually, in fact it is paid monthly. Sec. 191.04. If the person charging admission fails to collect the admissions tax, it is personally liable to the city for the payment of the amount due, and shall be guilty of a violation of the admissions tax. Sec. 191.04. A violation of the admissions tax results in a fine. With respect to the calendar years 1994, 1995, 1996 and 1997, Plaintiff paid the amounts of $15,977.07, $68,064.00, $64,807.13, and $76,333.16, respectively. Upon information and belief, Plaintiff is the principal taxpayer, and bears over 90% of the entire burden of the Westlake admissions tax.

23. If permitted to remain in effect, the admissions taxes will continue to cause substantial and irreparable harm to the Plaintiff and its patrons. The taxes impose an impermissible burden on rights protected by the First Amendment to the U.S. Constitution and by Article I, Section 11 of the Ohio Constitution. As applied, these taxes are levied only on the right to view movies and the right to hear and view other forms of entertainment, a chilling effect on free speech rights which cannot be adequately compensated through money damages.

24. The City Defendants have available to them other legal and proper procedures for raising revenues.

First Cause of Action

25. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 26, supra.

26. Plaintiff's operation of its theaters and the attendance of its patrons at movies shown in those theaters constitute activities protected by the First and Fourteenth Amendments of the United States Constitution and by Article I, Section 11 of the Constitution of the State of Ohio.

27. The Defendants' ordinances are both under- and over-inclusive and impermissibly burden these constitutionally protected activities.

WHEREFORE, Plaintiff prays for relief as follows:

1. A declaration that the Admissions Tax imposed by each Defendant is void as applied to Plaintiff and its patrons as an impermissible burden on First Amendment rights and rights protected by Article I, Section 11 of the Constitution of the State of Ohio;

2. An injunction prohibiting each City, its Mayor, and its Finance Director from enforcing or collecting the admissions tax from Plaintiff or its patrons;

3. A refund of all taxes paid by Plaintiff, plus interest as allowable by law;

4. An award equal to Plaintiff's attorneys' fees and costs; and,

5. Such other and further relief as this Court may deem just and proper.

DATED: May 14, 1998

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No. 00-619

FILED

NOV 16 2000

CLERK

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC.,

Petitioner,

v.

CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF MAYFIELD HEIGHTS, CITY OF MIDDLEBURG HEIGHTS AND CITY OF SOLON AND THEIR RESPECTIVE OFFICIALS

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QUESTIONS PRESENTED

1. Do admissions tax ordinances requiring Petitioner to collect a tax from its patrons violate Petitioner's right to free speech protected by the First Amendment?

2. Does strict scrutiny or intermediate scrutiny apply in reviewing the constitutionality of a content-neutral admissions tax ordinance?

3. Does the Petitioner have the burden of establishing that a content-neutral admissions tax is unconstitutional as applied?

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STATEMENT OF THE CASE

More than 40 years ago the four municipal Respondents duly adopted ordinances imposing an admissions tax on recreational activities conducted within their respective municipalities. The admissions tax is imposed upon every person who pays an admissions charge to any place. The term "place" includes theaters, dance halls, amphitheaters, auditoriums, stadiums, baseball and athletic parks, swimming pools and other types of facilities. Petitioner mischaracterizes the admissions tax when it states at page 3 of its Petition that: "Each ordinance requires the tax to be paid either by the patron or the vendor, but imposes ultimate responsibility for payment on the vendor." Contrary to the Petitioner's assertion, each of the admissions tax ordinances involved in the within matter expressly states that the admissions tax is to be paid by the patron and requires the business entity to collect the tax and remit it to the municipality. If the business entity fails to collect the tax, then it is liable to the municipality for the amount of the tax that it should have collected from its patrons.

For more than 30 years, the admissions taxes were paid by persons who were not patrons of Petitioner's theater businesses. It is only in recent years that market forces conducive to the expansion of movie theaters have resulted in more patrons and in movie theater patrons paying a substantial portion of the total admissions tax collected by the municipal Respondents. In past years, patrons of bowling alleys, golf courses and amusement activities paid most of the admissions tax receipts.

During the 1990's, long after the admissions tax ordinances were enacted by the Respondent municipalities, the Petitioner established movie theater businesses within the territorial jurisdictions of each of the Respondent municipalities. Prior to establishing the movie theater businesses in Respondent City

of Middleburg Heights and in Respondent City of Mayfield Heights, the Petitioner caused information to be furnished to each of the aforesaid Respondents indicating that the Petitioner would annually collect more than $100,000 of admissions taxes from its patrons which would then be remitted to the municipality. Petitioner acknowledged that its movie theater businesses attract large crowds of people and motor vehicles into a small geographic area during a concentrated time, resulting in altercations, accidents and injuries and engendering the need for additional police, fire and emergency medical services.

Petitioner claims that the admissions tax as applied violates the First Amendment and the Constitution of the State of Ohio. At the trial of the within action, Petitioner conceded that its claim is founded upon the possibility of censorship of films and not upon any threat or effort by the Respondents to censor Petitioner's exhibition of films. Indeed, within a five-year period from 1991 through 1996, the Petitioner expanded its business from eight movie theater screens in one municipality to a total of 49 movie screens located in all of the Respondent municipalities. Such a rapid expansion contradicts any notion that the Petitioner has in any way been restrained by the admissions tax. Nevertheless, the Petitioner continues its argument at page 16 of its Petition that it is the "potential for censorship" and not censorial statutory language or declared censorial intention which requires the application of a strict scrutiny standard. However, since there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation, strict scrutiny does not apply. Furthermore, there is a particular justification for the tax because the activities of the Petitioner attract large crowds of people and motor vehicles resulting in the need for added safety services all of which add to the cost burden upon the Respondent municipalities.

The issue in the instant matter is not constitutional impairment but rather profit impairment. The Petitioner's internal accounting procedure does not segregate the admissions tax from the total price charged to its patrons. Nevertheless, the Petitioner concedes that the price charged to its patrons includes a profit margin to the Petitioner even after considering the admissions tax imposed by the ordinances. Obviously, if the Petitioner was not required to remit the admissions taxes to the Respondent municipalities, it would retain the total price charged, including the admissions tax portion, and thereby enhance its profitability.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Certiorari because:

1. The Petitioner's allegation of a constitutional impairment is without substance and does not present a substantial constitutional question for consideration by this Court. The admissions tax ordinances impose an admissions tax on patrons who use recreational activities and require the business entity to collect the admissions tax from its patrons and to remit the tax to the municipality. The admissions tax ordinances apply to theaters, dance halls, amphitheaters, auditoriums, stadiums, baseball and athletic parks, swimming pools and other types of facilities. The admissions tax ordinances do not single out First Amendment activities as alleged by the Petitioner, but apply to numerous non-First Amendment activities.

2. The strict scrutiny standard advocated by the Petitioner does not apply to the admissions tax ordinances for the reason that they are content-neutral and there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation. Moreover, there is a particular justification for the tax because the activities of the Petitioner

attract large crowds of people and motor vehicles in a small geographic area during a concentrated time, resulting in altercations, accidents and injuries and the need for added police, fire and emergency medical services which impose a greater cost burden upon the Respondent municipalities.

3. Since the admissions tax ordinances are content-neutral, they are not presumed to be invalid under the First Amendment.

4. The Ohio courts in considering whether the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution correctly accorded the admissions tax ordinances the presumption of constitutionality. The Ohio courts also correctly determined that insofar as the Ohio Constitution was concerned the presumption of constitutionality could only be overcome by proof beyond a reasonable doubt.

ARGUMENT

1. Admissions Tax Ordinances Requiring Petitioner To Collect A Tax From Its Patrons Do Not Violate Petitioner's Right To Free Speech Protected By The First Amendment.

Petitioner claims that the admissions tax ordinances as applied to the Petitioner violate the Petitioner's right to free speech protected by the First Amendment. Petitioner asserts that notwithstanding the fact that the admissions tax ordinances do not expressly impair Petitioner's right to free speech and notwithstanding the fact that the admissions tax ordinances were not intended to affect Petitioner's right to free speech, that the strict scrutiny standard of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) should be extended and applied to the instant case. Respondents disagree. The strict scrutiny standard does not apply because there is no evidence establishing a burden on free speech, or a

singling out of the Petitioner for taxation and furthermore, there is a particular justification for the admissions tax. Respondents submit that the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367, 376 (1968) is applicable. The admissions tax ordinances comport with the intermediate scrutiny standard because the admissions tax is within the constitutional power of the Respondents, furthers an important governmental interest which is unrelated to the suppression of free expression and does not restrict free speech. Respondents submit therefore that the Petitioner's right to free speech is not violated by the admissions tax ordinances.

A. Strict scrutiny does not apply where there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation, and where there is evidence of a particular justification for the tax.

Relying on this Court's ruling in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), Petitioner mistakenly contends that the "strict scrutiny" standard should be used to review the municipal action in this case. Petitioner seeks to extend *Minneapolis Star* to a significantly different set of facts. The admissions tax ordinances at issue do not single out a First Amendment speaker and do not treat movie theaters differently. To apply *Minneapolis Star* to the instant facts would result in an expansion of the strict scrutiny standard. In *Minneapolis Star*, this Court held unconstitutional a narrowly drawn tax that was structured in a manner that appeared as if its goal was to suppress protected First Amendment expression. The tax in that case exempted the first $100,000 in newsprint and ink expenses. As a result, only the largest newspapers in the state had to pay the tax, which gave the tax the appearance of being content-based since it was the content of the large newspapers which presumably resulted in their being treated differently than smaller newspapers that

used less paper and ink. The Court's determination that the government action was content-based resulted in the use of strict scrutiny review. The tax in the instant case is not content-based, it is content-neutral and, thus, there cannot be an inference that the goal of the tax was to interfere with First Amendment activities.

The admissions tax in question is content-neutral in two respects: first, it applies to both First Amendment-protected venues (e.g., theaters) and non-protected venues (e.g., sporting events, circuses); second, it applies to all theater patrons regardless of the content of the film being shown (whether, for example, "Bambi" or "Pulp Fiction"). The tax also has no effect on a theater's ability to exhibit motion pictures. *See Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3d Cir. 1986) (strict scrutiny is not warranted where the regulation does not directly impinge upon the expressive aspect of moviemaking activities, as did the state taxation of ink and paper used by the press in "*Minneapolis Star*").

In fact, this Court has recognized that under *Minneapolis Star*, strict scrutiny is unwarranted when the differential treatment of First Amendment activities is "justified by some special characteristic" of the particular medium being taxed. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994), citing *Minneapolis Star* at 585. *See also National Amusement, Inc. v. Town of Dedham*, 43 F.3d 731, 741 (1st Cir. 1995); *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3d Cir. 1986). "Secondary effects," such as traffic and security problems associated with a complex containing 12 movie theaters, can comprise a "special characteristic" of a particular medium precluding strict scrutiny. *Dedham* at 740.

In this case, the admissions tax is justified by the special characteristics of Petitioner's mega-movie theater business,

which generates crowds of people and vehicles and gives rise to the need for additional safety services. Thus, strict scrutiny is unwarranted.

Petitioner argues that in recent years it has paid a disproportionate amount of the admissions tax. In essence, Petitioner asserts that because it has been so successful in expanding its theater businesses it remits a greater amount of the admissions tax to the Respondents. Petitioner interprets these facts as being violative of its constitutional right to free speech. Petitioner's position is in error for at least two reasons. First, no tax whatsoever is imposed upon the Petitioner. The Petitioner does not pay any admissions tax. The admissions tax is imposed upon persons who pay the admission charge, that is the patrons. Second, the admissions tax is directly related to the more frequent and increased safety services demanded by the large crowds and vehicular traffic generated by Petitioner's theater businesses. The additional safety services required by the Petitioner's business operations generate greater costs to the Respondent municipalities. Accordingly, the admissions tax is not disproportionate, but rather, it is congruous with the safety services received by Petitioner's patrons and businesses.

The imposition of the admissions tax on patrons of the movie theaters and the requirement that the Petitioner collect and remit the tax to the Respondent municipalities does not impair any constitutionally protected free speech rights. The admissions tax is warranted by the characteristics of the movie theater businesses which generate crowds of people and vehicles and give rise to security issues. The admissions tax does not in any way restrict or censor the display of movies. The interest of the municipalities in imposing the tax on the users of the theaters who generate the need for city services is reasonable.

B. The imposition of an admissions tax is within the constitutional power of the municipal Respondents, furthers an important or substantial governmental interest which is unrelated to the suppression of free expression, and has only an incidental restriction on free speech no greater than is essential to further the governmental interest and therefore, does not offend the First Amendment freedoms.

The appropriate test for determining the constitutionality of the admissions tax ordinances is articulated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." Under *O'Brien*,

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

Even after *Minneapolis Star*, the admissions tax ordinances are subject to the *O'Brien* "intermediate scrutiny" standard of review. *See Wayte v. United States*, 470 U.S. 598 (1985). *See also Associated Film*, 800 F.2d at 374; *Minneapolis Star*, 460 U.S. at 585 n.7 (referring to *O'Brien* approvingly as consistent with its analysis).

The admissions tax in the instant case complies with each prong of the *O'Brien* test. The imposition of the admissions tax is within the constitutional power of the Respondents. The important governmental interest served by the imposition of the tax is the raising of revenue

for traffic, crowd control, and security issues associated with the theater and enhancing order and tranquillity which would be achieved less efficiently absent the tax. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 at 586 (1983) (raising revenue is "critical"). The governmental interest is unrelated to the suppression of free expression. Moreover, Petitioner agrees that the express provisions of the admissions tax ordinances do not restrict free speech. Rather, the Petitioner asserts that the admissions tax ordinances may be applied to restrict free speech and that the possibility of such an application violates the First Amendment. In effect, Petitioner urges this Court to reject the *O'Brien* test and to extend *Minneapolis Star* even though there is no evidence establishing a burden on free speech or a singling out of the Petitioner for taxation. Respondents respectfully disagree with the Petitioner and urge this Court to reject the invitation to extend *Minneapolis Star* since the admissions tax ordinances do not treat the movie theaters differently from other enterprises and do not target particular theaters or movies.

2. The Petitioner Has The Burden Of Establishing That The Application Of The Admissions Tax Ordinances Deprives It Of A Constitutional Right.

A. Because the admissions tax ordinances are content-neutral, they are not presumed invalid under the First Amendment.

As noted by this Court, so long as legislation is content-neutral, the legislation is not presumed invalid under the First Amendment. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994). Also, pursuant to this Court's decisions, the burden remains with the Petitioner to demonstrate that it has been deprived of a constitutional right by the application of the

ordinances to it. *See United States v. O'Brien*, 391 U.S. 367 (1968); *Leather v. Medlock*, 499 U.S. 439 (1991). For the reasons stated above, Petitioner failed to meet its burden.

B. The Ohio Courts correctly imposed the standard of beyond a reasonable doubt with respect to the Petitioner's claim that the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution.

The Petitioner has alleged that the admissions tax ordinances violated the First Amendment and also violated Article I, Section 11 of the Ohio Constitution. In considering the alleged violation of the Ohio Constitution, the Ohio courts are required to presume the constitutionality of legislative enactments. *State, ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967). Pursuant to Ohio law, the presumption can only be overcome by proof, beyond a reasonable doubt, that the legislation and the Ohio Constitution are clearly incompatible. *State, ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955); *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993). The Ohio courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional under the Ohio Constitution. *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The Ohio courts acted in accordance with the applicable Ohio law in considering whether or not the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution and correctly applied the standard of beyond a reasonable doubt.

CONCLUSION

For the reasons and authorities stated above, Respondents submit that the Petition for Writ of Certiorari should be denied.

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No. 00-619

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IN THE

Supreme Court of the United States

REGAL CINEMAS, INC.,

Petitioner,

v.

CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF WESTLAKE AND ITS RESPECTIVE OFFICIALS

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QUESTIONS PRESENTED

Under the First Amendment, is a three-percent municipal admissions tax on patrons of a cinema presumptively invalid, warranting strict scrutiny, when:

(1) the admissions tax does not single out or target First Amendment speakers,

(2) the admissions tax is a generally applicable to admission-charging businesses, and

(3) the admissions tax is content neutral?

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STATEMENT OF THE CASE

Over fifty years ago, Respondent City of Westlake enacted an admissions tax of three percent (3%) on recreational activities conducted within the City. Contrary to the implication of Petitioner, the tax ordinances do not levy a tax on its business. Rather, the tax is paid by the patrons of the recreational establishments, collected by those establishments and remitted to the City.[1] This tax structure is shared by all of the Respondent municipalities — a sales tax on admissions, collected by the selling businesses, and remitted to the municipal government.[2] Despite the fact that Westlake's ordinance requires a vendor to collect the tax from patrons, Petitioner does not do so, but purports to pay the tax out of its general operating revenue. (*Compare* Petition for Writ of Certiorari at 3-4 "petitioner pays the admissions taxes to each of the cities out of its general operating revenues rather than charging its customers for the tax directly" *with* Westlake Ord. § 191.04, found at Petition Appendix 65a "Any person receiving any payment on which a tax is levied

1. Westlake's Ordinance is explicit, imposing a tax "upon every person who pays an admission charge to any place. . . ." (Petition for Writ of Certiorari Appendix at 62a)

2. In fact, similar admissions taxes are levied upon Petitioner's patrons by other suburban Cleveland municipalities; but there are other businesses in those municipalities which generate such taxes; which presumably accounts for the fact that those other suburban municipalities are not a party to this suit. Apparently, either Petitioner's business failure in those neighboring communities, or the success of other recreational establishments, thwarts any claim that these other suburbs' admissions taxes infringe on Petitioner's free speech rights. Not surprisingly, neither the film content nor the price of admission in these other suburban municipalities varies from the theaters within Respondents' borders.

under this chapter *shall collect* the amount of the tax imposed *from the person making the admission payment.*") (emphasis added). The admissions tax ordinance was enacted without specific reference to Petitioner, and Petitioner's patrons are not the only payers of such a tax in Westlake. Admissions to a golf course are also taxed.

In 1994, decades after enactment of Westlake's tax, Regal Cinemas opened a multi-plex theater in the City of Westlake and began collecting and remitting the admissions tax to the City. This new cinema was part of an expansion of Petitioner's business into the four Respondent municipalities; an expansion which was heralded by Petitioner's agents as a municipal revenue boon. In all these cities, Petitioner Regal charges the same admission prices (up to $6.75 per ticket); despite a variation on admission taxes between municipalities.[3]

In Westlake, Regal Cinemas has experienced great success in the past four years. The theater boasts eleven (11) big screens with a total seating capacity of 2,174. The average number of patrons per month is 40,000. In fact, from 1991 through 1996, Petitioner expanded its business in the Respondent municipalities from 8 screens to 49 screens.

3. Petitioner's claim that it pays the tax out of general operating revenue "for competitive reasons" is dubious. (Petition for Writ of Certiorari at 3). At trial, Petitioner's witness admitted that a ticket sale is still profitable even when it voluntarily deducts the admission tax from the ticket price charged. The same witness testified that $7.00 per ticket was the "market barrier" in the Cleveland area. Accordingly, even if Petitioner (as Westlake's Ordinance requires), actually collected the 3 % tax from patrons upon each ticket sale at Petitioner's highest cost ticket of $6.75, Petitioner would still not meet its so-called "market barrier" price of $7.00; and would, of course, increase its profit margin by 3 %.

Due to this expansion, and the market forces which created it, Petitioner Regal Cinemas' patrons have become the largest source of admissions tax revenue in all four Respondent municipalities. This revenue increase, however, has been accompanied by an increased burden on municipal services.

At trial, Petitioner acknowledged that its business generates large numbers of patrons in a concentrated area at concentrated times, resulting in accidents, injuries and incidents creating an increased need for municipal services. In Westlake, the large theatre generates a significant need for the services of the City's Department of Public Safety. The Regal Cinemas in Westlake are in a retail complex known as the Promenade; which includes diverse concerns including large retail stores, restaurants and other recreational and general businesses. The Promenade is approximately 30 acres in size. From January 10, 1995, through August 18, 1998, the Westlake City Police Department received 2,211 calls for police services from Promenade. Of those total number of calls, 328 were calls that were readily identified by the Westlake Police Department as calls for services from Regal Cinemas. In other words, Regal Cinemas, which is 1 of 32 businesses in the Promenade, accounts for 1 in 7 of the Police calls to the Promenade area. It was quite clear from the trial testimony that the sheer number of the Cinemas' patrons, those patrons' age and associated traffic places a greater demand on City services than any single other business in the Promenade and such use clearly demands more City resources than any other single part of the Promenade alone.

Petitioner brought suit against the four Respondent municipalities in the Cuyahoga County, Ohio, Court of Common Pleas; seeking a refund of the remitted taxes and a

declaration that the admissions taxes violated both the First Amendment to the U.S. Constitution and Article I, Section 11 of the Ohio Constitution — a similar free speech guarantee. Following a bench trial, the trial court granted judgment in favor of the Respondent municipalities, and that judgment was affirmed by the Ohio Court of Appeals for the Eighth Appellate District; in a lengthy opinion addressed primarily to First Amendment law as expounded by the federal courts. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000). The Ohio Supreme Court declined discretionary review. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 89 Ohio St. 3d 1454 (2000).

At trial, it was confirmed that there is absolutely no evidence of censorial intent, of censorial threats, or that the admissions tax has had any effect on the content of Petitioner's films. As the lower court noted: "[Petitioner's] own stipulations refute any suggestion that its freedom of expression has been harmed by the ordinances." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000), *review denied*, 89 Ohio St. 3d 1454 (2000).

REASONS FOR DENYING THE WRIT

Petitioner argues that a parade of horrible potential dangers warrants a grant of review in this case. The alleged dangers presented by Petitioner, when viewed in light of the factual and procedural background of this case, however, do not withstand scrutiny. This case does not involve a tax which targets the press. This case does not involve differential treatment of certain members of the press. This case involves a content neutral tax on patrons of

recreational amusements — a tax of general application of the type which have long been upheld by the courts. In short, Petitioner complains of an ordinary and reasonable judgment issued by a state court of appeals.

Given the foregoing, it seems clear that the Petition is without merit. This case does not involve an important question of federal law that has not been but should be decided by the Court. Sup. Ct. R. 10(c). This case does not turn on an important federal question which has been decided by a state court of last resort in a manner conflicting with another state court of last resort. Sup. Ct. R. 10(b). Finally, of course, this case does not involve a decision of a United States Court of Appeals which conflicts with a decision of a state court of last resort. Sup. Ct. R. 10(a).

Rather, despite making an as-applied challenge to the taxes at issue, Petitioner seeks to persuade the Court of this case's significance, not because of the facts before it, and not because of the law applied below. Instead, Petitioner argues that this case is significant from a public or constitutional standpoint if there were different facts. Critically, the appellate court observed that "there is no incidental effect on Regal's alleged free speech rights." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000). At best, Petitioner's case presents not a substantial constitutional question, but a barely colorable claim asserted for parochial, commercial interests. As will become more clear below, in addressing the Petition's assertions, Petitioner essentially armed itself with two misguided California appellate opinions in the vain hope of convincing an Ohio court, contrary to a wealth of precedent elsewhere, that strict scrutiny should be

applied to a content-neutral tax of general application simply because Petitioner moved to, and thrived in, municipalities which enacted that tax.

The Petition pleads for review based upon grand and lofty statements of the purpose and intent of the First Amendment. In the main, Respondent Westlake agrees with Petitioner's statements, as did the courts below. Yes, Petitioner is entitled to First Amendment protection. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 68 (Ohio App. 8th Dist. 2000) ("The First Amendment protects motion pictures as fully as other means of expression."). Yes, a law which targets the press is subject to strict scrutiny, as is a law which governs speech content. *Id.* However, Petitioner is mistaken in the application of these, our most cherished constitutional laws, to the facts of this case — points to which Respondent now turns.

I.

THE OHIO COURTS DID NOT ERROR IN APPLYING INTERMEDIATE SCRUTINY TO A CONTENT NEUTRAL LAW OF GENERAL APPLICATION

The heart of Petitioner's complaint in this matter, and the decisive question considered below is the appropriate level of scrutiny to be applied by the courts. The courts below examined the issue and concluded that the Court's *Minneapolis Star* opinion and related cases did not dictate strict scrutiny, and that intermediate scrutiny was appropriate for a content neutral, generally applicable tax on patrons. This decision was compelled by the facts of the case, as found by the lower courts.

A. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES DO NOT TARGET FIRST AMENDMENT SPEAKERS.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court considered a very special tax; an ink and paper commodity tax which exempted the first $100,000 of ink and paper consumed in any one year. As the Court noted:

> Minnesota . . . has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. * * * Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper.

Minneapolis Star, 460 U.S. at 581-82. The Court's first amendment inquiry was expressly premised upon this unique tax scheme:

> By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special treatment.

Minneapolis Star, 460 U.S. at 582. Ultimately, the Court applied strict scrutiny for two reasons — the tax "singled out the press for special treatment" and in addition "targets a small group of newspapers." *Minneapolis Star*, 460 U.S.

at 582, 591. The Court reached the same conclusion, on the same grounds, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), wherein the tax itself was structured to apply to only a few speakers:

> While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, 460 U.S. at 586 n.9, 103 S. Ct. at 1372 n.9, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; in that respect, it operates in much the same way as did the $100,000 exemption in the Minnesota use tax.

Arkansas Writers' Project, 481 U.S. at 229. *Accord Leathers v. Medlock*, 499 U.S. 439, 446 (1991); *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 659 (1994).

This case, however, has none of these features. The taxes at issue are levied on admissions charged to any "place". (Petition for Writ of Certiorari at 3) The taxes do not "single[ ] out the press for special treatment". *Minneapolis Star*, 460 U.S. at 582. The taxes do not "target[ ] a small group" of speakers. *Minneapolis Star*, 460 U.S. at 591. The taxes are not "structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 660 (1994). There is simply nothing in the ordinances at issue which

targets either the press or the Petitioner particularly — a fact which this Court has stated is of great importance. In this case, the law at issue does not:

> *inevitably* single out bookstores or others engaged in First Amendment protected activities as did the tax struck down in *Minneapolis Star*. As we noted in *Minneapolis Star*, neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities.

Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) emphasis added). In fact, the municipal ordinances at issue do not even render Petitioner a taxpayer at all — its patrons are the proper taxpayers.

B. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES ARE ECONOMIC REGULATIONS OF GENERAL APPLICABILITY.

The Court's *Minneapolis Star* opinion expressly noted that: "our cases have consistently recognized that nondiscriminatory taxes on receipts or income of newspapers would be permissible." *Minneapolis Star*, 460 U.S. at 586 n.9. Since the *Minneapolis Star* decision, the Court has had multiple opportunities to readdress this observation; and has wholeheartedly confirmed this to be the First Amendment rule.[4] For instance, in *Leathers v. Medlock*, 499 U.S. 439

4. Notably, the Court's more recent opinions post-date those published state court opinions relied upon by Petitioner as purportedly establishing a nearly uniform rule that municipal (Cont'd)

(1991), the Court was confronted by the cable television industry's objection to the Arkansas sales tax which exempted some media and which had been extended to cable service sales. The Court rejected strict scrutiny because the tax was not content based, because it did "not single out the press" and because "the Arkansas tax has not selected a narrow group" of speakers to pay the tax -- observations which all inhere in the case at bar. *Id.* at 448, 449.

Similarly, in *Jimmy Swaggart Ministries v. Bd. of Equalization of Calif.*, 493 U.S. 378 (1990), the Court confronted a ministry's First Amendment Free Exercise challenge to the application of California's sales and use tax to religious articles. A unanimous Court rejected the challenge:

> California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas or beliefs per se; rather it is a tax on the

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(Cont'd)
admission taxes are unconstitutional. In point of fact, the reasoning utilized by those state court opinions has been criticized not only by the academics, but also by other state courts. *See, e.g., Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 401, 394 S.E.2d 652, 655 (Va. 1991), Willner, *Admissions Tax on Movie Theaters Infringes Freedom of Speech: A Novel Argument that has Worked . . . So Far*, 10 Loy. Ent. L.J. 555 (1990).

> privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

Id. at 389. Again, these similar observations can be made in the case at bar.

Petitioner places great emphasis on its "as-applied" challenge, without acknowledging all the facts presented to the courts — not only has there has been no impact on the content of its films, but the tax "represents only a small fraction of any retail sale, and applies neutrally to all retail sales of [admission tickets] made in [the Respondent municipalities]." *Id.* The taxes at issue in this case are plainly analogous to the content neutral, generally applicable sales taxes considered and upheld by this Court in *Leathers* and *Jimmy Swaggart*; a point discussed at length in oral argument before the Ohio Court of Appeals.

C. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES ARE CONTENT NEUTRAL.

Petitioner does not claim that the taxes are applied on the basis of content. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 229 ("a magazine's tax status depends entirely

upon its content.") Rather, Petitioner argues that where a government regulation *could* be used to manipulate content, strict scrutiny is applicable. Of course, the proposition itself proves its fallacy. *All* regulation, tax or otherwise, *could* be used to manipulate content and, arguably speech — there is an "apparently limitless variety of conduct [that] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Of course, all laws regulating conduct are not subject to strict scrutiny.[5]

The question decided by the courts below was whether the generally applicable, minimal taxes in this case, which do not target the press, and which are not based on content, ran afoul of the First Amendment. The answer was obviously in the negative, as this Court's own precedent dictates. The First Amendment:

> does not require the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, we face no such situation in this case.

Jimmy Swaggart Ministries v. Bd. of Equalization of Calif., 493 U.S. 378, 392 (1990) (citations omitted). The Court faces no such situation in this case as well. *See Regal Cinemas,*

5. As one court noted: "political assassination is a gesture of political protest too, but no one is disposed to work up any First Amendment enthusiasm for it." *East Hartford Education Ass'n v. Bd of Educ. of the Town of East Hartford*, 562 F.2d 838, 842 (2d Cir. 1977).

Inc. v. City of Mayfield Heights, 137 Ohio App. 3d at 72 ("Regal has grown its business six times over . . . in less than seven years despite the admissions taxes.")

II.

THE ORDINANCES AT ISSUE CLEARLY PASSED INTERMEDIATE SCRUTINY

Petitioner argues that the tax at issue was insufficiently narrow to pass constitutional muster. As it did consistently below, Petitioner uses reasoning and case law applying *strict* scrutiny, which requires least restrictive means, to argue that the municipal taxes in this case are insufficiently precise to pass intermediate scrutiny.[6] While this argument is certainly convenient for Petitioner, it is flatly rejected by law.

As the Court of Appeals noted, intermediate scrutiny does not require a least-restrictive-means analysis. Rather, the inquiry is whether the law "promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 71 (Ohio App. 8th Dist. 2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The Court has consistently held this to be the case. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1397 (2000) ("least restrictive means analysis is not required."); *Turner Broadcasting System, Inc. v. Federal*

6. Indeed, it appears one could argue that the appropriate level of scrutiny is a rational basis review. *See Regan v. Taxation with Representation Washington*, 461 U.S. 540 (1983); *American Society of Ass'n Executives v. United States*, 23 F. Supp. 2d 64, 70 (D.D.C. 1998), *aff'd*, 195 F.3d 47 (D.C. Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1961, 146 L. Ed. 2d 792, 68 U.S.L.W. 3513 (2000).

Communications Comm'n, 512 U.S. 622, 661 (1994) ("a regulation need not be the least speech-restrictive means of advancing the government's interest."); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Petitioner, again relying on strict scrutiny cases, fatuously argues that raising revenue is not "sufficient . . . to justify" the municipalities' generally applicable tax statutes. (Petition for Writ of Certiorari at 17). Again, the Court has certainly disagreed. Revenue is a "critical" and "important" interest. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992). As the Court of Appeals noted, the recreational admission taxes "raise valuable revenue for traffic, crowd control and security at venues which attract a large number of people in a congested area at the same time." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 70 (Ohio App. 8th Dist. 2000). Petitioner argues that the Respondent municipalities involved should have enacted different taxes to raise revenues, despite the simple fact that the taxes at issue are, *already*, generally applicable, content-neutral regulations. Petitioner is plainly in error.

Intermediate scrutiny forbids a court from second-guessing the legislative authority. A "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). In other words:

> Regulations that burden speech incidentally or control the time, place and manner of expression must be evaluated in terms of their general effect.

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. * * * the validity of regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

United States v. Albertini, 472 U.S. 675, 689 (1985).

What Petitioner fails to acknowledge, or to disclose to this Court, is that scrutiny of the taxes' propriety "requires a balance between the governmental interest and the magnitude of the speech restriction." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 537 (1987). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1397 (2000); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79 (1976). In this case, as the Court of Appeals noted, "there is *no* incidental effect on Regal's alleged free speech rights." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000) (emphasis added). In sum, there is virtually nothing to counterbalance the municipalities' significant interest in raising revenue. As the Court noted in *Leathers*:

> *the government need not exempt speech from a generally applicable tax.*
>
> * * *
>
> Since the members of the legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of

> constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.
>
> * * *
>
> *Taken together, [our cases] establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment. . . .*

Leathers v. Medlock, 499 U.S. 439, 451-453 (1991) (emphasis added). Petitioner's First Amendment claim is insubstantial.

III.

THE COURT OF APPEALS DID NOT IMPROPERLY IMPOSE A BEYOND A REASONABLE DOUBT BURDEN OF PROOF

Petitioner's final complaint is that Cuyahoga County Court of Appeals "obliged [it] to 'prove beyond a reasonable doubt' that the admissions taxes veiled a censorial motive to suppress 'certain ideas'." (Petition for Writ of Certiorari at 19) This is a remarkable allegation; directly belied by the Court of Appeals' own opinion. Petitioner makes several leaps of logic to concoct a perceived error where none exists.

First, Petitioner blandly asserts that it is entitled to a presumption of invalidity because the ordinances at issue were equivalent to content-based regulations of speech, an assertion contradicted both by this Court's own opinions and

by the decisions of the courts below that strict scrutiny was inapplicable. *See Leathers*, 499 U.S. at 451 (absent targeting or content based distinctions, "in the First Amendment context [there is a] strong presumption in favor of duly enacted taxation schemes"). Second, Petitioner asserts that the Ohio opinion created precedent dictating the application of a "beyond a reasonable doubt standard" in First Amendment cases. Again, this is belied by both the law and the Court of Appeals' own opinion. The Court of Appeals directly addressed Petitioner's assignment of error that the trial court "committed prejudicial error when it required Regal to prove beyond a reasonable doubt that the admissions taxes are unconstitutional." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 73 (Ohio App. 8th Dist. 2000). Contrary to Petitioner's assertions, while the Ohio court did reiterate Ohio's common law regarding a presumption of constitutionality, the Court of Appeals certainly did not mandate a "beyond a reasonable doubt standard" for First Amendment cases; and unquestionably did not ignore the Supremacy Clause of the U.S. Constitution.[7] Rather, the Court of Appeals held that, under the evidence:

> the cities' admissions taxes were supported by an important government interest unrelated to the suppression of free expression and they did not

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7. Of course, Ohio courts, including the Court of Appeals which decided this case below, are well-versed in and have not hesitated to apply federal law as the supreme law of the land. *See, e.g., Jenkins v. James B. Day & Co.*, 69 Ohio St. 3d 541 (1994); *Marketing Research Services, Inc. v. Public Utilities Comm'n of Ohio*, 34 Ohio St.3d 52 (1987); *State v. Shirley M.*, 136 Ohio App. 3d 753 (Ohio App. 8th Dist. 2000). Indeed, the Court of Appeals opinion below reads as an homage to federal jurisprudence.

> unnecessarily restrict Regal's alleged free speech rights. *Under any standard of proof, the trial court's findings were supported by the record. Furthermore, this court "is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." State ex rel. Carter v. Schotten* (1994), 70 Ohio St. 3d 89, 82, 637 N.E. 2d 306; *Myers v. Garson* (1993), 66 Ohio St. 3d 610, 614, 614 N.E. 2d 742.

Regal Cinemas, Inc. v. City of Mayfield Heights, 137 Ohio App. 3d 61, 73-74 (Ohio App. 8th Dist. 2000) (emphasis added).

In light of the above, one should not conclude that the lower courts created any precedent for the application of a beyond a reasonable doubt standard of proof on First Amendment plaintiffs in Ohio. The trial court's unpublished opinion is not controlling authority in any judicial district in the State of Ohio. *See* Ohio Supreme Court Rule for the Reporting of Opinions 3. The appellate court opinion which, as noted above, did not mandate an increased burden of proof, is only considered controlling authority in Cuyahoga County, one of Ohio's eighty-eight counties. *See* Ohio Supreme Court Rule for the Reporting of Opinions 2. Finally, as this Court has indicated, the denial of further appeal generally imports no view on the merits of the lower court's decision. *Brown v. Allen*, 344 U.S. 443 (1953).

In short, Petitioner claims a presumption of unconstitutionality to which it is not entitled, for the purpose of claiming a phantom conflict between the courts of Ohio and those of other states.

CONCLUSION

The case presented to this Court is constitutionally insubstantial both literally and figuratively. Despite the Court's identification of three circumstances in which strict scrutiny is available, despite the fact that none of those circumstances are present in the case at bar, despite the fact that the ordinances at issue are generally applicable economic regulations, and despite the fact that there is absolutely no evidence of an effect on Petitioner's free speech expression, Petitioner continues to claim entitlement to a level of First Amendment review reserved for government censorship. This case presents not a First Amendment claim, but rather a First Amendment pretense, pursued by an entity which "has grown its business six times over" under a general admissions tax of patrons, voluntarily paid by the Petitioner. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000).

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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